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## THE EUROPEAN UNION AND THE STRUGGLE FOR HUMAN RIGHTS

FROM THE ECHR TO THE TREATY OF LISBON:  
THE EC/EU STRATEGIES TO AFFIRM HUMAN  
RIGHTS WITHIN AND OUTSIDE EUROPE

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*To Prof. Antonio Varsori,  
The Best Guide I Could Ever Have*

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## ACRONYMS

ACP Countries	Asia-Europe Meeting Asia and Latin America
AIDCO	EuropeAid Cooperation Office
ASEAN	Community Assistance for Reconstruction
ASEM	Asia-Europe Meeting
ALA	Asia and Latin America
CARDS	Community Assistance for Reconstruction, Development and Stabilization
CFSP	Common Foreign and Security Policy
COREPER	Committee of Permanent Representatives
CSP	Country Strategy Paper
DG	Directorate General
DG RELEX	Directorate General External Relations
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EEW	European Evidence Warrant
EHRF	European Human Rights Foundation
EIDHR	European Initiative for Democracy and Human Rights/ European Instrument for Democracy and Human Rights
EP	European Parliament
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
FRA	Fundamental Rights Agency
MEDA	Mediterranean Countries
MEP	Member of the European Parliament
NGO	Non Governmental Organization
OECD	Organization for Economic Cooperation and Development
OSCE	Organization for Security and Cooperation in Europe
PHARE	Action plan for coordinated aid to Poland and Hungary
SAARC	South Asia Association for Regional Cooperation
Tacis	Technical Assistance to the Commonwealth of

TEU	Independent States
UDHR	Treaty on the European Union
UN	Universal Declaration of Human Rights
	United Nations

## INTRODUCTION

For many, the introduction by the European Union's Lisbon Treaty of a range of significant human rights provisions marked the coming of age of the EU as a human rights actor. While 2009 has been understood to be the high point of the EU human rights regime, the low point has been identified as the silence of the founding treaties in the 1950s. In this sense, the traditional narrative commences with the total absence of any reference to human rights in the three founding European Community Treaties and describes the gradual emergence and progressive advancement of a powerful EU human rights regime over the ensuing decades.

However, history has certainly shown that the EU's road for human rights has not always been uphill. As Professor Angel Viñas, Director for Multilateral Political Relations and Human Rights within the European Commission between 1997 and 2001, once said, "the battle for human rights was sordid in the extreme". Even if with the entrance in the new millennium Europe showed a growing support for human rights, behind the scenes a never-ending struggle has taken place, demolishing, in many cases, the few achieved results.

This dissertation, through the recall of the traditional narrative of progress, wants to make an analysis of the most relevant victories and defeats of the European's human rights battles. It does so by returning to the origins of the EU in the 1950s and comparing the ambitious but long forgotten plans for European Community engagement with human rights, with the actual developments, which occurred over the subsequent 60 years. Besides, considering the development and implementation of an effective external human rights policy can only be undertaken in the context of appropriate internal institutional arrangements, the following chapters will treat both internal and external dimensions of human rights, following as far as possible a chronological order.

The first chapter begins with the familiar account of the EU's engagement with human rights issues, which tells us that while the Council of Europe and its leading instrument, the European Convention on Human Rights, were established in 1949 with the primary purpose of promoting human rights, democracy, and the rule of law, the European Communities subsequently founded in the 1950s were almost entirely devoted to economic integration and left the task of human rights protection to the broader sister



organization in Strasbourg. In so far as human rights issues made their way onto the EC's agenda, this was mostly in a reactive response by the European Court of Justice to challenges posed to its authority by national constitutional courts that were concerned about the standards of protection in EC law for domestic constitutional rights. The silence of the founding Treaties confirmed the supremacy of economic interest in the European arena during the 1950s, leaving a "loud silence" in the draft of the Treaty of Rome of 1957.

Although human rights did not figure in the original Treaties, they steadily gained in importance from the late 1960s. During those years Europe made a first step through the foundation of a EU's development policy, which saw the strengthening of the relationships between the Sub-Saharan Africa, the Caribbean and the Pacific states (ACP) and the European Community. Over the following decade, these states gained their sovereignty and because of the ex-colonial bounds with EU member states, it was important to build up cooperation within a brand new approach. The "Uganda Guidelines" grounded the relations on a legal basis enhancing the partnership between European Economic Community and these states. However, the "sanction policy", adopted by the Community to suppress gross human rights violations carried out by ACP countries, didn't work for long. In a few years came along three Lomé Conventions, each one of them with the purpose to create a broader and enhanced relation between the partners, but at the same time with no references to human rights.

Moreover, in the same years, a predominant role was played by the EC Nine, particularly in the sphere of the EPC. The main aim of the European member states was to obtain a successful outcome of the Helsinki Conference of 1975, in order to safeguard and promote definite West European interests and values in the CSCE final agreement. Human Rights in this context should have been the connection between East and West, becoming part of the new European "Identity".

The second chapter marks the transition towards a completely new dimension, which starts to develop in the 1990s. In the post Cold-War era, changes in the external environment, as well as internal reforms, required a re-focusing of human rights and democratic strategies, in particular to ensure that these issues would permeated all EU policies. A major step in integrating human rights and democratic principles into the EU's policies was taken with the entry into force of the Treaty on European Union on 1993. Since then, human rights has become one of the objectives of the EU's Common Foreign and Security Policy (CFSP) and a constant and stable feature of EU external

relations. A clause defining respect for human rights and democracy as an “essential element” of the EU external relationship was included in all agreements with third countries. Under it, all cooperation, association, and free-trade agreements concluded by the EU with third countries were bound by respect for human rights.

The human rights clause represented a new model for EU external relations as well as for international cooperation, and had implications for the development of international rules concerning trade-related human rights policy and for the accession of third countries in the European Union during the following years.

As Maastricht Treaty, also the Lomé Convention signed in 1990, had some new features. Lomé IV, and later the modified Lomé IV bis, became the first development agreement to incorporate a human rights clause as a “fundamental” part of cooperation. According to the clause any violation would lead to partial or total suspension of development aid by European Union.

Despite Lomé’s achievements, in 2000, after the expiration of Lomé IV (bis), Cotonou Agreement will come into action introducing a new approach and a broader partnership while preserving the fundamental instruments of the previous Conventions. With Cotonou, political dialogue in the ACP-EU agreement will become the main Instrument of the EU, marking a new stage for Europe due to this change of politics. However, if on one side dialogue will become an effective instrument to seat at the table with countries previously overshadowed, on the other side it will also represent a weakness for the Union, due to a lack of efficacy of its measures.

The second chapter closes with the Treaty of Amsterdam, signed on 1997, and which represented another significant step forward. The Treaty reaffirmed the EU’s basic principles introducing a mechanism to sanction serious and persistent breaches of human rights by EU Member States. Its entry into force brought a variety of new demands, which would be sufficient in themselves to require a thorough rethinking of the Commission’s human rights activity. This rethinking, however, put the Commission in the middle of a real “paper fight” concerning the Budget Lines of the EU human Rights funds and programmes. This battle will be the focal point of the third and last chapter.

In relation to a very large number of countries, the Commission has played a vital, constructive and often innovative role in supporting human rights and democracy initiatives, providing funds for election support and observation, and ensuring

humanitarian assistance. However, it had also to deal with a large number of problems. First of all the fragmentation of responsibility, meaning that none of the bureaucratic entities responsible for human rights policy was large enough to develop the range of staff and the level of expertise required to contribute to the development of the consistent, transparent, efficient, credible and conspicuous human rights policy to which the Union aspired. Secondly the lack of coordination related to a general lack of transparency, and lastly, and even more problematic, the issue of the legal basis. For these reasons 2000 has been a transitional year for the Commission in its delivery of assistance for the promotion and protection of human rights and democratic values.

Following the central role accorded to the respect for human rights and democracy by the Amsterdam Treaty, and the adoption in April 1999 of Council Regulations 975 and 976, the Community had at its disposal a comprehensive and coherent basis for the implementation of human rights and democracy budget lines, in order to provide them a legal basis under Chapter B7-70. This Chapter B7-70, entitled 'European Initiative for Democracy and Human Rights (EIDHR)', was created by an initiative of the European Parliament in 1994, which brought together a series of budget headings specifically dealing with the promotion of human rights. The management of human rights and democracy programmes spread across several departments of the Commission. The DG Development had a unit responsible for these measures in the ACP States. DG External Relations was instead responsible for the programmes in central and eastern Europe, the new independent States, Latin America, the Mediterranean, and Asia, but it was also responsible for all B7-70 budget lines, by fusing the former Human Rights and ACP unit with the Human Rights and Democratization unit.

Of course internal fights lacked very little. Those fights, tackled through an assiduous exchange of internal notes, occupied time and energy of the Commission for many years, creating a climate of incertitude and mistrustful. One of the central debates over the first decade of the new millennium was about budget lines and related launched programmes of the Commission, as far as concerned human rights promotion. The European Human Rights Foundation, which was established by the same Commission with the European Parliament and human rights NGOs with the aim of distributing funds to human rights organizations world-wide through the European Human Rights Fund (EHRF), had a contract with the European Commission since its origins. The incertitude in 2000 about renewing or not the contract, created opposite fronts that gave life to many inner battles.

Other significant developments contributed to cause further internal tension. In fact, for the first time in 2000, the human rights and democratization unit of the External Relations Directorate General assumed world-wide responsibility for all 11 human rights and democracy budget lines under EIDHR, all under the remit of a single Commissioner for External Relations, Chris Patten. In May, the Commission launched an ambitious reform package for the management of external assistance programmes. The package provided for a 'radical overhaul' of programming, the integration of the project cycle with a single body in charge of implementation (EuropeAid), the extensive devolution of project management to Commission delegations, and measures to deal with old and dormant commitments. However, only one year later, the Commission services started arguing for a significant reduction in the budget lines, raising in 2001 the number of five lines under Chapter B7-70. In the same year the Commission services responsible for Human Rights and Democracy (notably AIDCO and RELEX) started a new "notes' battle" concerning an additional reduction of the budget lines from five to one.

The external action of the Commission was guided by the principles contained in the Charter of Fundamental Rights, which was officially proclaimed at the Nice Summit in December 2000. This represented the coherence between the internal and external aspects of the EU's action in the field of human rights that the Commission made efforts to achieve. The Charter enshrines the very essence of the European aquis regarding fundamental rights, and introduced some important innovations. However, only in 2009 with the ratification of the Lisbon Treaty the Charter will become legally binding. The Lisbon Treaty also enshrined a commitment to accede to the European Convention on Human Rights; one of the measures Europe was waiting since 1950.



## CHAPTER I

### FROM THE 1950s TO THE 1970s: THE ECHR AND THE SILENCE ON HUMAN RIGHTS

#### 1.1 THE ECHR COMPROMISES

Simply as a European Bill of Rights, the Convention on Human Rights and Fundamental Freedoms offered little that was exceptional on the international scene. What was extraordinary about the Convention was the Strasbourg's enforcement machinery. The heart of its efficacy had been for almost 50 years<sup>1</sup> provided by two crucial optional clauses: Article 25, which gave individuals as well as states the right to petition the European Commission of Human Rights for relief, and Article 46 that gave the European Court of Human Rights judicial jurisdiction to hear and try cases already reported upon by the Commission. Particularly relevant in the early days of the Convention was whether or not a European state would agree to accept individual petition and judicial jurisdiction. Historically, the Europeans were familiar with bills of rights but, unlike Americans, they were generally unfamiliar with judicial enforcement of those rights. Domestically they trusted the legislative and executive branches of government rather than the judicial branch of fundamental freedoms<sup>2</sup>. In the 1950s the question was whether Europeans would be willing to empower an international commission and a court to safeguard human rights. As it is easy to imagine, at the beginning the European governments were reluctant to accept those optional clauses, but over time and one-by-one the members of the Council of Europe consented to the clauses. What had been originally conceived as legal options became perceived in Europe as politically non-optional. Indeed by 1995 all 30 states then party to the Convention had accepted both Article 25 and 46. However, despite the successful result, the path toward the unanimous acceptance had been long and tortuous.

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<sup>1</sup> Until November 1998. The Commission's functions were merged into the Court in 1999 providing a significant change in the machinery system.

<sup>2</sup> J.Frowein, *European Integration Through Fundamental Rights*, Journal of Law Reform, 1984, p.19.

The Congress of Europe convened by the International Committee of Movements for European Unity was held at the Hague from 8 to 10 May 1948; it included 633 delegates from sixteen countries<sup>3</sup> and observers from ten others<sup>4</sup>. The purposes of the congress were to demonstrate the wide support for the cause of European unity, providing a new impulse to this movement and to make practical recommendations for the accomplishment of its objectives. Between the participants there were a number of former Prime Ministers and Foreign Ministers, many members of Parliament and leading citizens from different sectors of the community, that were not going to become members of the Consultative Assembly. The President of Honor was Winston Churchill, and the chairmen of the three committees of the congress were M. Paul Ramadier, a former Prime Minister of France, M. Paul van Zeeland, a former Prime Minister of Belgium, and Salvador de Madariaga, a former Spanish Foreign Minister.<sup>5</sup> In the *Message to Europeans* adopted at the final plenary session the delegates proclaimed:

“We desire a United Europe, throughout whose area the free movement of persons, ideas and goods is restored;

We desire a Charter of Human Rights guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition;

We desire a Court of Justice with adequate sanctions for the implementation of this Charter;

We desire a European Assembly where the live forces of all our nations shall be represented;

And pledge ourselves in our homes and in public, in our political and religious life, in our professional and trade union circles, to give our fullest support to all persons and governments working for this lofty cause, which offers the last chance of peace and the one promise of a great future for this generation and those that will succeed it.<sup>6</sup>

At the beginning of 1949 the International Juridical Section of the European Movement was set up and started working to prepare a draft Convention in which the Contracting

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<sup>3</sup> Austria 12, Belgium 18, Britain 140, Denmark 32, Ireland 5, France 185, Germany 51, Greece 18, Italy 57, Liechtenstein 3, Luxembourg 8, the Netherlands 59, Norway 12, Saar 5, Sweden 19, Switzerland 39.

<sup>4</sup> Bulgaria, Canada, Czechoslovakia, Finland, Hungary, Poland, Romania, Spain the USA and Yugoslavia.

<sup>5</sup> A.H. Robertson, *Human Rights in Europe*, Manchester University Press, 2006, p.88.

<sup>6</sup> Ibidem, Churchill was not speaking on behalf of his nation. In those years he was chef of the opposition forces and Great Britain, instead, was firmly contrary to a possible European Federation project.

Parties would undertake to uphold the fundamental liberties of their citizens and establish a European Court to adjudicate in cases of alleged violation. The prepared draft was then submitted to the Committee of Ministers of the Council of Europe, with recommendations concerning the importance of the Court item.

The European Convention took most of its structure from the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations on 10 December 1948. The Declaration was a tool of soft law, this means it didn't contain legally binding obligations, but its authors wanted to have "a moral value and authority which is without precedent in the history of the world"<sup>7</sup>. The Declaration in this way gave expression to what had to become principles of law recognized and acted upon by States members of the UN.<sup>8</sup>

Once the Declaration was proclaimed the General Assembly instructed the Commission on Human Rights to give priority to the drafting of a Covenant containing legal obligations for States and measures of implementations. In 1952 the General Assembly opted for 2 different Covenants: one concerning economic, social and cultural rights and the other on civil and political rights. In 1966, after the submission of the drafts to the ECOSOC and the General Assembly the two Covenants and the Optional protocol to the ICCPR were approved.

When the Council of Europe started its work in 1949, it found ready to hand the statement of rights contained in the UDHR, while it was already available the first draft of the UN Covenant prepared by the Commission on Human Rights of the United Nations. The Committee of Ministers, despite the recommendations received, did not include human rights on the draft agenda, which it drew up for the first session of the Assembly in 1949<sup>9</sup>. Afterwards, three proposals relating to human rights were made by different groups of representatives, and the Assembly itself proposed to include on its agenda the study of "measures for the fulfillment on the declared aim of the Council of Europe in accordance with Article one of the Statute, in regard to the maintenance and further realization of human rights and fundamental freedoms".<sup>10</sup>

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<sup>7</sup> L. Harees., *The Mirage of Dignity on the Highways of Human "Progress"*, Authorhouse, 2012, p.171.

<sup>8</sup> H. Lauterpacht, *The Universal Declaration of Human Rights*, *British Yearbook of International Law*, 1948, p.354. With the passage of time the Declaration has acquired greatly increased authority by virtue of its reaffirmation by the General Assembly on several occasions, its incorporation by reference into national constitutions and otherwise. Some authors now consider it as a statement of customary international law.

<sup>9</sup> Consultative Assembly, *Minutes of Proceedings of the Second Sitting*, 11 August 1949. A.H. Robertson, *Human Rights in Europe*.... p.32.

<sup>10</sup> M. W. Janis, R. S. Kay, A. W. Bradley, *European Human Rights Law Text and Materials*, Third Edition, Oxford University Press, 2008, p.212.



The fear of creating a duplicate of the UN Declaration, creating as consequence confusion between the two organizations, because of the setting of two different treaties on the same matter, made the Committee of Ministers voting against the inclusion of the item on the Assembly's agenda. Winston Churchill replied to this decision saying "a European Assembly forbidden to discuss human rights would indeed have been ludicrous proposition to put to the world"<sup>11</sup>.

The insistence of the Assembly on the definition of the human rights issue led to the 1949 formal proposal of establishing an organization within the Council of Europe to ensure and guarantee the respect of human rights. The first question toward the establishment of a human rights system of protection was about the rights that should had been protected. Basically the question was: Should they be limited to the common rights as in the American Bill of Rights or in the French Declaration, or should the Convention include social and economic rights?

Together with the proposed list of fundamental rights the Assembly requested all member states to respect the fundamental principles of democracy (hold free elections, universal suffrage, secret ballots etc.) in order to guarantee the respect of the rights. It was then to be left to each signatory state to determine the ways and the rules by which ensure those rights and guarantee the application of the principles. Moreover, for a successful system it was also proposed, and then accepted, the creation of two important new organs: a European Commission for Human Rights and a European Court of Human Rights.

In November 1949 a Committee of governmental experts was appointed to conclude a draft of the Convention that was then elaborated by the Committee of Ministers and that mostly followed the definitions of the Commission on Human Rights of the UN. In this context, one of the sagest decisions had been that to establish detailed definitions of rights to be protected, in order to let governments know whether or not their internal laws were in conformity with the Convention.

During the 1950s several new proposal and changes had been made and discussed during the sessions held by the Assembly, but despite the need in many issues to compromise, important changes were made. As Lord Layton stated, "I regard the Convention watered down as it is, as a most important landmark in European history."<sup>12</sup>

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<sup>11</sup> Consultative Assembly, *Official Report* of 17 August 1949, Debates of the Assembly, 1949, Vol. I p.284.

<sup>12</sup> Council of Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights*, Martinus Nijhoff Publishers, 1985, p.118.

Thus, the European Convention, despite all its difficulties in achieving results, represented in 1950 a new technique in the drafting of treaties, which resulted from the dual nature of the Council of Europe. On one side the Consultative Assembly (the parliamentary organ) that proposed the conclusion of the Convention, and on the other side the Committee of Ministers (the governmental organ), which acted on that. The Council of Europe's technique of making conventions has been one of its most successful achievements, resulted in many other consecutive and equally successful conventions.

After fifteen months of negotiations between 1949 and 1950, the United Kingdom deposited the first ratification on 8 March 1951. The Convention entered into force on 3 September 1953 and the First Protocol on 18 May 1954. However, the Convention will have to wait until 1974 to obtain the ratification by all the members of the Council of Europe.

## 1.2 THE SUPERVISORY ORGANS UNDER THE CONVENTION

The authors of the Convention believed it was not sufficient to impose the Contracting Parties to respect the different rights and freedom; they required also some measures of international control. In other words national obligations were not enough, it was necessary an international machinery to reinforce them. In this respect the Council of Europe followed the principle already established by the General Assembly of the United Nations in 1948, according to which the proclamation of the UDHR would be followed by another instrument providing for "measures of implementation". This idea was clarified in Article 19 of the Convention, asserting the establishment of the Court and the Commission of Human Rights "to ensure the observance of the engagements under-taken by the High Contracting Parties"<sup>13</sup>. Thus, under Article 59 of the ECHR, members of the Commission and of the Court were entitled, during the discharge of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.<sup>14</sup>

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<sup>13</sup> M. Cherif Bassiouni, *International Extradition: United States Law and Practices*, Sixth Edition, Oxford University Press, 2008, p.264.

<sup>14</sup> D. Gomien, D. Harris, Leo Zwaak, *Law and practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe Publishing, 1999, p.31.

### 1.2.1 THE EUROPEAN COMMISSION

The members of the Council of Europe agreed on the idea of the Assembly that a European Commission was needed. This Commission had to be an impartial, international body to which complaints could be made in the event of any member state failing to secure to anyone within its jurisdiction the rights and freedoms defined in the Convention. The relevant provisions of the Commission were contained in the third section of the Convention, which was constituted by Articles 20-37<sup>15</sup>. According to the Convention the number of members had to be equal to that of the Contracting Parties and that the members did not have to represent states. Thus, the members had to be independent from their governments.

Its principal functions were to investigate presumed violations of the Convention and to draw up reports concerning those violations. So, from its very beginning, the Commission had an intermediate position in the system of European Human Rights law. On the one hand, it was meant to shield the Court from a possible deluge of individual complaints, a function that also protected the traditional sovereignty of the member states. On the other hand, the Commission was meant to serve as an international institution directly accessible to individuals, a radical change from traditional state-centered international legal process. Thus, the Commission had become not only an intermediary between individual and states but also between individuals and the Strasbourg Court. Complaints about violations of the Human rights protected by the Convention were sent first to the Commission. According to Article 24 of the Convention, states could refer to the Commission "any alleged breach of the provisions of the Convention by an other High Contracting Party"<sup>16</sup>. Article 24 permitted any contracting state to complain about the conduct of any other contracting state regardless of the nationality of the injured individual. Furthermore the Convention provided that a state might agree to permit private parties themselves to petition the Commission for relief. This aspect of the European law had to be found firstly in Article 25: The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting

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<sup>15</sup> Ibid.

<sup>16</sup> Directorate of Human Rights Council of Europe, *Yearbook of the European Convention on Human Rights, The European Commission and European Court of Human Rights*, Springer-Science + Business Media, B.V, 1962, p.140.

Parties against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right<sup>17</sup>.

The Commission's three principal functions, which were filtering complaints through admissibility proceedings, mediating disputes through the process called "friendly settlement" and fact-finding, and reporting on admitted but unsettled disputes, have all been absorbed since 1999 by the reformed European Court of Human Rights<sup>18</sup>.

### 1.2.2 THE EUROPEAN COURT OF HUMAN RIGHTS

During the negotiations of the Convention different opinions arose regarding whether or not a European Court should be created at all. Lots of doubts were due to the preferable number of judges and to the admission of the right of individual petitions. So, since the proposal to create a court with compulsory jurisdiction did not receive the support of the majority, it was not included in the draft Convention. A compromise solution was then found out, toward the involvement of an optional provision concerning whereby the Court would have jurisdiction only in respect of those states which expressly accepted it by making a declaration. On the date of entry into force of the Convention only three States had accepted the right of individual petition (Denmark, Sweden and Ireland) and two the compulsory jurisdiction of the Court (Denmark and Ireland)<sup>19</sup>. Once, during the following years, the acceptances of the compulsory jurisdiction of the Court had been received, the procedure for the election of the judges was put in motion. Under Article 39<sup>20</sup> of the Convention, the judges were

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<sup>17</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 19.

<sup>18</sup> M. W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law Text and Materials*, Third Edition, Oxford University Press, 2008, p.75

<sup>19</sup> A. H. Robertson, *Human Rights in Europe: Being an Account of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 Nov. 1950, of the Protocol thereto and of the machinery created thereby: the European Commission of Human Rights and the European Court of Human Rights*, Manchester University Press, U.S.A, Oceana Publications Inc. , 1963, pp.91-92.

<sup>20</sup> ECHR - ARTICLE 39 - Friendly settlements

1. At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

2. Proceedings conducted under paragraph 1 shall be confidential.

3. If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision, which shall be confined to a brief statement of the facts and of the solution reached.

elected by the Consultative Assembly of the Council of Europe from lists of persons nominated by the member states. This somehow repeated in reverse the procedure for the elections of the members of the Commission of Human Rights, who, under Article 21, were elected by the Committee of Ministers from a list of names drawn up by the Consultative Assembly on the basis of lists proposed by the national delegations, each of which put forward three candidates. The participation of both organs of the Council of Europe was thus secured in the election of both the Commission and the Court. The membership of the Court has changed considerably with the time because of deaths, resignations, new elections and the admission of new members of the Council of Europe; despite that the requirement requested by Article 39<sup>21</sup> had always been respected.

### 1.3 THE EEC TREATY OF 1957 AND THE SILENCE POST-RATIFICATION

The Treaty of Rome, establishing the European Economic Communities (EEC) in 1957, made only indirect references to human rights<sup>22</sup>. These can be found specifically in Article 7 (non-discrimination on account of nationality)<sup>23</sup> and also in Article 119 (equal pay for equal work by men and women)<sup>24</sup>. More important than the treaty's failure to identify non-discrimination as a human right has been the treaty's lack of intention to set out that principle as a human right. The Treaty of Rome, as legal instrument establishing a common market and progressively approximating the economic policies of Member States<sup>25</sup>, was distinctly focused on economics and the elimination of market-distorting measures. Discrimination that was not based on grounds specific to a particular type of employment was seen in that context quite simply, as inefficient. It is true that Article 2 of the Treaty provided: "The Community shall have its task by establishing common market... , an accelerated raising of the standard of living and closer relations between the States belonging to it..."<sup>26</sup>, however, the goal of a higher

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4. This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

<sup>21</sup> Ibid.

<sup>22</sup> Treaty Establishing the European Economic Community, opened for signature March 25, 1957 and entered into force January 1, 1958.

<sup>23</sup> Ibid., Article 7 of the ECC Treaty reads, in relevant part, "Within the scope of this Treaty, ... any discrimination on grounds of nationality shall be prohibited..."

<sup>24</sup> Ibid., Article 119 of the ECC Treaty reads, in relevant part, "Each Member State shall... maintain the application of the principle that men and women should receive equal pay for equal work".

<sup>25</sup> Ibid., Article 2.

<sup>26</sup> Ibid.

standard of living was more directed at ensuring an adequate food supply in Post-War Europe than the protection of the second and third generation of human rights<sup>27</sup>. Indeed, the provision regarding the maintenance of labor standards recited: “Member States agree upon the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained”.

The Treaty of Rome then was little more than a trade agreement, either in fact or in aim, but not at all a decent tool of protection of human rights.

It has to be underlined that there was no explicit decision to exclude all reference to human rights, or to rule out any role for human rights protection in those two treaties. On the contrary, the European Economic and Euratom Communities were intended to serve the “human ideal of brotherhood” shared by the six member states.<sup>28</sup> In the aftermath of the failure of the EDC (European Defense Community), however, it was made the decision, in accordance with the Messina Resolution provisions, to establish the EEC<sup>29</sup>, remaining close to the terms of the Resolution and excluding in so doing any discussion of any issue that was not expressly mentioned in the Messina Resolution. This strategy was strongly supported by Spaak, at that point Belgian minister for Foreign Affairs, who chaired the relevant committee (the Intergovernmental Committee on European Integration) and prepared the report that led ultimately to the drafting of the EEC Treaty.<sup>30</sup> In particular, he was determined to avoid any subject that was not expressly mentioned in the Messina Resolution, in so doing avoiding the many controversial and political issues that led to the downfall of the EDC and EPC treaties.<sup>31</sup>

The subject of human rights protection was actually raised during the drafting process. It seems that an attempt was made by the German delegation during the drafting of the EEC Treaty to include in the treaty a human rights “reservation clause” similar to that

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<sup>27</sup> F. M. Abbott, C. Breining-Kaufmann, and T. Cottier, *International Trade and Human Rights, Foundation and Conceptual issues*, The University of Michigan Press, 2006, pp.314

<sup>28</sup> Statement of Foreign Minister Paul-Henri Spaak, EEC and CECA Treaty Negotiations, Rome 25 March 1957, <http://www.ena.lu/discours-paul-henri-spaak-occasion-signature-traites-rome-rome-25-mars-1957-010000644.html>

<sup>29</sup> The aim of the resolution was to revive the process of European integration by focusing on economic integration and the establishment of a common market. Resolution of the Ministers of Foreign Affairs of the ECSC in Messina, CM3/NEGO/006, June 1955, [http://www.ena.lu/resolution\\_adopted\\_foreign\\_ministers\\_ecsc\\_member\\_states\\_messina\\_june\\_1955-2-987](http://www.ena.lu/resolution_adopted_foreign_ministers_ecsc_member_states_messina_june_1955-2-987)

<sup>30</sup> Now simply known as the Spaak Report, it was formally entitled the Brussels Report on the General Common Market and adopted in June 1956.

<sup>31</sup> P.H. Spaak, *The Continuing Battle: Memoirs of a European 1936-66*, Littlehampton Book Services Ltd, 1971, p.87.

contained in the draft EDC treaty. Article 3 of the EDC treaty had articulated the subsidiarity principle and indicated that the EDC would not take measures impinging on protected human rights and freedoms. The individual's fundamental human rights were thus placed as a wall against the exercise of power by the new Community and as a constraint on the way in which the conferred powers were to be exercised. The German proposal for a similar clause in the EEC Treaty was rejected by other delegations, for two basic reasons: the perceived risk that member states might invoke such a clause to refuse particular Community actions, thereby undermining Community goals; and the difficulty or impossibility of attending to all of the different sets of rights protected under the various member state constitutions without subordinating Community laws and goals to those multiple and varying requirements.

In other words, by the time that the EEC and Euratom Treaties were drafted, the prevailing vision of the new European system had changed. It was no longer to be one that would have a substantial role in promoting and protecting human rights, and it would not work alongside the Council of Europe and the ECHR system for that purpose. A new strategy of limited, functional, step-by-step progress toward closer European integration was adopted instead. The powers and ambitions of the new Communities were to be narrowly determined by the common-market mandate outlined in the Messina Resolution. Human rights protection was not to be addressed.

The German delegation's vision was that human rights would served as a negative constraint on the integration process, as a residual core to be protected against the institutions and potential intrusions of the new Community, just as against any institutions of government. The delegation's effort to introduce human rights into the EEC treaty obviously failed, but not because of any specific objections to the Community's having a defined role in the area of human rights. Over a decade later, this same vision of human rights would actually re-emerge and consequently begin to shape the Community's conception of human rights. What propelled this later reshaping of the Community legal order was a series of cases brought by German litigants before the ECJ.

So the silence of the 1957 treaties on human rights is best understood as no more than a consequence of a decision to rethink the optimal path toward closer European integration and to follow a path of gradual integration instead of taking the single giant step toward European political community. In other words, anything more should be read into that silence; for example, that it reflected a decision by the drafters or

governments that human rights matters should remain outside the scope of the new Communities or that the Council of Europe would be better placed to supervise questions of human rights in the new Communities and their member states. On the contrary, once the Council of Europe was firmly established as a forum for specific kinds of intergovernmental cooperation, the more integration-oriented states took the view that it was not the appropriate forum for closer European integration; the two sets of European organizations were perceived as moving on different, although parallel, paths. The Council of Europe was established as a broader, European organization for intergovernmental cooperation on a range of issues that included human rights and cultural, educational, health, and economic matters. The monitoring and coordination mechanisms of the Council of Europe were not seen as a substitute for some of the possible functions of the Communities, even in the field of human rights. By contrast, the European Communities were a vehicle for states to pursue closer and deeper integration through a system in which they conceded some of their sovereign powers and accepted a significant degree of supranational control and influence by the new organization. The gradual strengthening of the ECHR and the European Court of Human Rights certainly sustained the interest of the Communities in maintaining close links with the ECHR system, including its Court, and the question of EEC accession to the ECHR was repeatedly considered, albeit always as a first step toward the Community developing its own policy on human rights. But the question of the EEC's own engagement with human rights issues (both internally and externally) and the desirability of establishing a more explicit EEC human rights dimension continued to be raised throughout the early years and decades of the Communities' existence. A series of initiatives in the 1960s and the early 1970s are especially noteworthy in this context, including the Fouchet Plan of 1961, which proposed that it would be "the aim of the Union . . . to contribute thus in the Member States to the defence of human rights, fundamental freedoms and democracy,"<sup>32</sup> the 1968 European Commission declaration on completion of the customs union, which called for the next steps forward toward political union based on a "Europe of the peoples" and concerned with "human problems," and the 1970 Davignon report<sup>33</sup> on political union, which asserted that "a

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<sup>32</sup> Article 2 of the proposed treaty drawn up under the Fouchet Plan and presented at the Bonn Conference of 1961. (Draft Treaty - Fouchet Plan I, Art. 2, Nov. 2, 1961.)

<sup>33</sup> <http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=URISERV%3Aa190000>



united Europe should be based on a common heritage of respect, and the liberty and rights of man, and bring together democratic States with freely elected parliaments.”<sup>34</sup>

More generally, the pragmatic decision to remain close to the Messina Resolution indications and to avoid the failure of the EEC Treaty did not imply that the newly established EEC had no aspirations for the Communities to develop into a broader and deeper political project. On the contrary, various provisions of the Treaty, including the preamble (“determined to lay the foundations of an ever closer union among the peoples of Europe”) and the mandate in Article 138.3 for direct elections to the European Parliament, suggest that the aspiration for closer union and broader political integration was not abandoned, but only postponed.

#### 1.4 HUMAN RIGHTS IN THE EUROPEAN CONTEXT BETWEEN THE 1960s AND THE 1970s

Between the late 1960s and the early 1970s the world had to face lots of changes, and Europe in particular had been subject of a reshape due to a new European Integration process. As far as concern Western Europe, changes in political leadership took place almost at the same time in the most important countries: from De Gaulle to Pompidou in France, from Kiesinger to Brandt in West Germany, from Wilson to Heath in Britain<sup>35</sup>. These changes led to new opinions, new policies and new goals, whose developments left an important sign in the European Community. Values that had been part of the Western Europe for decades became part of the past in a few years. Europeans left behind their former reconstructionist approach adopted after the World War II entering a new path. Also the political sphere had to take into consideration such developments in its decisions, at its national, regional and international level.

After the Treaty of Rome, which left many open questions about a policy on human rights, Europe lived years of silence, incertitude and more than a few clashes. A relevant role during those years had been the one of the Council of Europe, which, once again came back in the European ground making a step forward trough the

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<sup>34</sup> G.M. Gaspare and H.Tareko, *Regional Integration and Democratic Conditionality: How Democracy clauses Help Democratic Consolidation and Deepening*, Routledge, 2015, p.107.

<sup>35</sup> A. Varsori, G. Migani, *Europe in the International Arena during the 1970s, Entering a Different World*, European Interuniversity Press, 2011, p.2.

construction of a new policy strongly requested by the public opinion. On October 18, 1961, the European Social Charter opened for signature, evolving over time as it had been for the ECHR. The document entered into force only four years later, on February 26, 1965, with the scope to complement the ECHR by establishing a regional European system for the protection of economic and social rights. All but six of the forty-seven member states of the Council of Europe became parties to the original Charter and most of them ratified also the successively revised Charter.

Despite the relevant adherence of the Member States, the Charter revealed itself as a single act with few further developments. After the ratification, in fact, Europe returned to the previous silence that characterized the years after the Treaty of Rome.

Paradoxically, the Community during the 1970s obtained much more successful results on the matter of human rights in external relations than in the internal sphere. The only considerable aftermaths within the Community were made under the pressure of some Member States, mostly in the economic and social sphere and thanks to the actions/decision taken by the European Court. So, little by little, human rights concerns started to appear in the European Economic Community agenda, but from the internal point of view, they gained recognition as general principles of law whose protection was to be assured by the Court. The Court affirmed the importance of human rights and their place within the EEC legal system, and consequently human rights became no longer foreign to the integration process. Moreover, in June 1979, the European Parliament had been, for the first time, elected by universal suffrage and became the main advocate of human rights, channelling the demands of the European Public Opinion.

Together, in many European Member States the ECHR provisions were incorporated into national law and the European integration process proceeded rapidly. On 1 January 1973 Denmark, Ireland and the United Kingdom joined the European Community, raising the number of Member States to nine. The short but brutal Arab-Israeli war of October 1973<sup>36</sup> resulted in an energy crisis and economic problems in Europe. The last right-wing dictatorships in Europe came to an end with the overthrow of the Caetano regime in Portugal in 1974 and the death of General Franco of Spain in 1975. The European regional policy started to transfer huge sums to create jobs and infrastructure in poorer areas, giving a small but noteworthy contribute to the

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<sup>36</sup> The war was fought by the coalition of Arab states led by Egypt and Siria against Israel from October 6 to 25, 1973. The fighting mostly took place in the Sinai territories that had been occupied by Israel since the Six-day War of 1967.

development of people's economic and social rights. The repression exercised by the above mentioned regimes in the late '60s and in the '70s, and the attention this repression was given, for example by the European Parliament, at the time made the EEC draw consequences for its relations with them. As regards Greece, the EEC had concluded an Association Agreement<sup>37</sup> of indefinite duration with the country in 1961, which was meant to pave the way to full membership. The coup d'état of April 1967 and the subsequent military regime in Greece counteracted this course of affairs and caused a freeze of the implementation of the Association Agreement<sup>38</sup> that was only activated from September 1974. On 1 January 1981 Greece acceded to the European Community. Relations with Spain and Portugal were instead for a long time limited to what was perceived to be absolutely necessary from a commercial point of view, such as the preferential trade agreements of limited duration concluded between 1970 and 1972. After the Portuguese revolution in 1974 and the death of Franco in 1975, the relations were gradually intensified and culminated in Community membership as from 1 January 1986. Basically, the Council of Europe in those years maintained the same flexible approach as previously. In the case of Greece, which under its military dictators had earlier resigned from the Council of Europe and denounced the Convention, the new Government pledged to restore democracy was allowed ample time between renewal of ratification and acceptance of the two key clauses (article 25 and 46). A similar Council benevolence was shown to Spain and Portugal, where applications for membership followed swiftly upon the ending of their military dictatorships. In the case of Portugal, after its "carnation revolution"<sup>39</sup>, the Council was content for it to enter reservations to six different Convention articles, all of which continued until 1987. Clearly in these cases the dominant goal was to nurse these states back to democratic health, in full awareness by this time that the Convention implementation machinery and the extensive case-law had made conformity with Convention guarantees a much more daunting prospect than had been the case in the 1950s and 1960s.

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<sup>37</sup> On 9 July 1961, Greece and the European Economic Community (EEC) signed an Association Agreement that provided for the possibility of future accession. The Agreement would enter into force on 1 November 1962. See [http://aei.pitt.edu/960/1/enlargement\\_greece.pdf](http://aei.pitt.edu/960/1/enlargement_greece.pdf)

<sup>38</sup> At the time the Commission took the position that because the Association Agreement contained no cancellation provisions, there was a legal obligation to implement the Agreement. The solution to the dilemma was found in minimal implementation of the Agreement (named "current administration") which in practice froze the relations. Some members of the European Parliament argued that the rupture of democratic structures in Greece changed circumstances to such an extent that resorting to the clause *rebus sic stantibus* would have been justified. Others argued that maintaining the relationship would have allowed political influencing of the situation as well as contact with the opposition. E.R. Grilli, *The European Community and the Developing Countries*, Cambridge University Press, 1993, pp. 182-185.

<sup>39</sup> C. Salm, *Transnational Socialist Networks in the 1970s. European Community Development Aid and Southern Enlargement*, Palgrave Macmillan, 2016, p.102.

## 1.5 THE NINE AND THE "THIRD BASKET" OF THE 1975 HELSINKI FINAL ACT (1975)

The years of the second half of the 1970s were labeled as the ones in which the grand détente quickly deteriorated: not only did the Soviet invasion of Afghanistan in December 1979 mark the end of the 1970s, but it opened the period of a new Cold War that would find its end ten years later with the fall of the Berlin Wall. In such a panorama the Helsinki conference represented the most obvious symbol of détente, as well as its shortcomings, misgivings, wrong hopes and misperceptions. When the Final Act had been signed, it came to be alternatively considered as the climax in a new relationship between East and West or the mere official recognition of the European balance that had been opened in the mid-1950s with the early détente. However, in a few years, owing to the new Cold War, the Helsinki agreement appeared to be void of any meaning, with the obvious exception of the human rights issue. For some time opinion-makers, as well as politicians and diplomats seemed to regard the emerging struggle for the recognition of human rights in Eastern Europe as a development that very few CSCE negotiators, if any, had been able to foresee.<sup>40</sup>

The "Conference on Security and Cooperation in Europe" was formally opened on July 3, 1973, continued at Geneva from September 18, 1973 to July 21, 1975, and was concluded at Helsinki on August 1, 1975. The thirty-five participants included all the eastern and western European states, except Albania, regardless of their size, the Soviet Union, the United States, Canada, the Papacy, and the three "mini-states" of Liechtenstein, Monaco, and San Marino. The final agreement, which was signed on August 1, 1975, included four sections relating to: questions involving the security of Europe; cooperation in the fields of economics, science and technology, and the environment; cooperation in humanitarian and other fields; and the "follow-up" to the conference. The final act did not follow the lead of the Universal Declaration or of the United Nations Covenants in providing that "everyone has the right to" a number of fundamental rights and freedoms; rather, it provided that "the participating States will respect human rights and fundamental freedoms. . . . " Thus, in accordance with the whole philosophy of the final act, the action of states rather than the situation or behavior of individuals was the target of the human rights provisions. The first three

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<sup>40</sup> Angela Romano, *From Détente in Europe to European Détente, How the West Shaped the Helsinki CSCE*, P.I.E. Peter Lang S.A., Brussels, 2009, pp.206-208.

sections of the actual text of the final act are commonly known as three "baskets", the third of which concerned human rights.

The impact of the "baskets" found during the years opposite opinions. On one side scholars denied that this agreement would mark the beginning of a new era of detente and cooperation in Europe. They believe such hopes, have been disappointed because little changed, and the old atmosphere of mutual suspicion seemed to continue almost unabated for many years. On the other side many as Angela Romano did, argued that the Helsinki Conference was not only the long hoped goal of Moscow's policy towards Europe, but also the consequence of the development in Western positions, especially as far as the leading West European nations were concerned.

As the Nine members of the EC were so committed to a successful outcome of the conference, their leaders focused their attention on issues that would both safeguard and promote definite West European interests and values in the CSCE Final Agreement. This was the reason why the Nine singled out the Human Rights Issue as the most relevant one.<sup>41</sup> The West's preoccupation with bringing the human rights issue within the ambit of cooperation in the CSCE was reflected in the Act both in the Decalogue<sup>42</sup> and in the establishment of a third basket on cooperation in humanitarian fields. From the outset, the West was demanding support for greater freedom of movement for persons, ideas and information between countries which, in spite of their geographical proximity and cultural affinities, found themselves divided by the Iron Curtain. By giving such support, the countries of the West also sought to contribute to resolving specific humanitarian problems concerning, for example, binational marriage or meetings of families living in different States. Their challenge was to overcome the Soviet opposition to the entry on the agenda of an international conference of items which, for the Soviets, fell within their national competence — and, in particular, came under their sovereign right of control over entry to and exit from their territory by their own nationals or the need to protect Socialist citizens from Western attacks on ideology — and bring into East-West relations the key to their future transformation.

Although the First Meeting relating to the Follow-up to the CSCE, held in Belgrade, failed specifically on account of the categorical refusal by the countries of Eastern Europe publicly to take stock of human rights matters, the countries of the West

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<sup>41</sup> Ibid.

<sup>42</sup> See Principle VII on human rights and fundamental freedoms.

succeeded, as from the Second Follow-up Meeting in Madrid, in extending the scope of the third basket to encompass religious and trade union freedom and to visa and immigration matters. That triggered more detailed discussions, in particular after the meetings of experts, first in Ottawa in 1985 on respect for human rights and fundamental freedoms and then in Berne in 1986 on contacts between people. However, it was not until the Third Follow-up Meeting in Vienna (1986–1989) that a new phase was initiated in that area with the introduction of the ‘human dimension’ of the CSCE. From then onwards, that comprehensive concept, comprising the humanitarian issues of the third basket and the commitments relating to Principle VII, would closely link human rights and security. Furthermore, preparations had been finalized for monitoring the implementation of commitments by way of a “human dimension mechanism” based on requests for information and bilateral diplomatic meetings. In addition, a three-stage Conference (in Paris, Copenhagen and Moscow) on the Human Dimension of the CSCE was entrusted with considering the application and development of the Vienna mechanism.

## 1.6 SOLANGE I AND THE ISSUE OF THE EEC ACCESSION TO THE ECHR

Always in the mid 1970s, the European Economic Community saw its role and powers questioned, opening a debate concerning particularly the fundamental rights recognized and assured by its Constitution. The promoter of this international debate was Germany, which, through the internationale *Handelsgesellschaft* case<sup>43</sup> brought to light a very important question for the West German government, the Community and the other Members: did the “Community law” of the EEC supersede the fundamental rights established in Germany’s basic law? Of course the issue concerned not only Germany but all the Member States.

Article 24 of the German constitution permitted the transfer of sovereign powers to intergovernmental institutions. Thus, in general the German courts had no difficulty in accepting the supremacy of Community law. However, one issue that did cause some

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<sup>43</sup> *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970). The Common Agricultural Policy permitted exports only by exporters who obtained an export licence, on a deposit of money, that could be forfeited if he failed to make the export during the licence’s validity period. The Internationale Handelsgesellschaft mbH claimed that the licensing system was a disproportionate violation of their right to conduct a business under the German constitution, because it did more than was necessary to achieve the public objective at hand. Alina Kaczorowska-Ireland, *European Union Law*, Routledge, New York 2016, pp.236-238.

difficulty was the question of whether Community law could take priority over the inalienable fundamental rights contained in the German Basic Law. In this case the German Constitutional Court stated that in the present state of evolution of the Community it would not renounce its right to uphold German fundamental rights in the face of a conflict with Community law. The Constitutional Court did not accept that Community law had to take priority even over German fundamental rights in cases brought before the European Court. However, on the facts of this case the German Court accepted that the Community legislation did not violate German fundamental rights. The reservations noted by the Constitutional Court included the fact that the European Parliament was not at the time directly elected<sup>44</sup> and that the Community law did not include a precise catalogue of fundamental rights.<sup>45</sup>

The *Solange I* decision<sup>46</sup> did not necessarily imply that the EEC had to accede to the ECHR. The Community could have developed its own bill of rights, which would have provided the rights protection required. This was indeed the path followed by the Community institutions when they adopted the *Joint Declaration on Fundamental Rights* on April 5, 1977. The Declaration recalled the “prime” importance they attached to fundamental rights and in particular to the ECHR.<sup>47</sup> The Commission itself, in its memorandum on the accession to the ECHR, stressed the compatibility of the two way of proceeding.<sup>48</sup> Proponents of this route reasoned with Member States whose constitutions contained guarantees of rights, while this did not prevent them from become parties to the Convention.

This “incorporation route” was long and tortuous, leaving the debate open for more than thirty years. The Joint Declaration of the European Parliament, Council and Commission on Human Rights of 1977 accelerated the process of incorporation, but without reaching relevant achievements. The first judgments of the Court requiring the Community to respect fundamental rights made no direct reference to the ECHR.<sup>49</sup> At

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<sup>44</sup> The first elections were held in 1979.

<sup>45</sup> On the other side, the dissenting opinion emphasized that the German Constitutional Court was bound by the EC law.

<sup>46</sup> May 29, 1974

<sup>47</sup> O.J. 1977, C 103.

<sup>48</sup> “It should be clearly stated from the outset that accession of the European Communities to the ECHR does not form an obstacle to the preparation of a special Community catalogue, nor does it prevent in any way the Court of Justice of the European Communities from further developing its exemplary case law on the protection of fundamental rights” Memorandum of 4 April 1979, Bulletin of the European Communities, supp. 2/79, para 8.

<sup>49</sup> Case 4/73, *Nold* [1974] ECR 491, refers generally to indications drawn from international instruments. Similarly, six years later Case 136/79, *Panasonic*, [1980] ECR 2033, refers to both the common

the time, not all Member States had ratified the Convention. The first direct reference appeared shortly after the ratification of the Convention by France in May 1974, in *Rutili*<sup>50</sup>, even if the Convention did not yet appear to be incorporated as such. After those sentences discussion about the matter continued to be at the center of the European arena, and the option of concluding an accession agreement remained open and was proposed by the Commission in 1979.<sup>51</sup> Nevertheless, for a long time this proposal was unheeded and it was not until the Belgian Presidency in the second half of 1993 that an ad hoc working group was formed to examine the issue. As it's well known, unlike the Council of Europe, the European Economic Community was not generally known in the past as a human rights organization and certainly did not see itself as such. Instead, it saw itself as pioneering a historically unique experiment of cross-border economic integration, an experiment that was not obviously or visibly based on high principles such as human rights. The main aim of the EEC was to ensure economic and social progress "by common action in eliminating the barriers which divide Europe"<sup>52</sup>, and not the protection of rights. More and more sectors of the national economies were hence forth to be integrated into a common market.

Market integration in the EEC was to be advanced by conferring four freedoms: free movement of workers, the right of establishment, free movement of capital, and the right to provide services. It is of course possible to view the four freedoms listed above from the perspective of human rights theory and doctrine, but the reality is that they were granted because of their purely instrumental value in helping to forge a new common market.

Through the project of constructing a common market, it was hoped that the EEC model would lead to more political integration in two ways. First, any common market used to require common efforts at maintaining and stabilizing it. National rules would not do, since there was always the standing danger that such laws would reflect national interests and not a common European public interest. Second, all markets

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constitutional traditions and the international instruments to which Member States "collaborated or of which they are signatories".

<sup>50</sup> "Taken as a whole, these limitations placed on the powers of Members States ... are a specific manifestation of the more general principle enshrined in ... the Convention for the protection of human rights and fundamental freedoms ... ratified by all Member States...", Case 36/75, *Rutili*, [1975] ECR 1219.

<sup>51</sup> D.Ehlers, U.Beckel, *European Fundamental Rights and Freedoms*, De Gruyter Recht, Berlin, 2007, p.14.

<sup>52</sup> Treaty establishing the European Economic Community, EEC Treaty – original text: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023>



used to have impacts that require regulation. Effective regulation inevitably entails a common approach, something that can only be achieved through more political integration. Hence it was hoped at least in some quarters that there would be a natural spillover from the exigencies of economic integration into an unstoppable dynamic for political integration.

The Council of Europe and the European Community shared the same ultimate goal of a Europe at peace with itself and its neighbors but despite this the original treaties did not spell out a vision of political integration, and since these treaties focused mainly on means (especially economic means) rather than ends, they allowed those who held opposed visions of the ultimate ends of European integration to sign up together to the technocratic process of economic integration. In other words, the focus on economic means allowed those countries that viewed Europe as a transcendent ideal and those countries that viewed Europe as founded on (and bounded by) the nation- state to contribute equally to the economic experiment.

The argument between these competing visions of Europe provided the prism through which human rights have become viewed in the European context. The argument for more visible human rights provision in European treaty law fitted perfectly with the march towards greater political integration and the movement towards a federal Europe. But here laid the problem; many who favor a Europe of the nations argued against more human rights provision because it would have entailed ceding more sovereign power to the Institutions of the Community.

## 1.7 THE ROLE OF HUMAN RIGHTS IN THE EUROPEAN EXTERNAL RELATIONS BETWEEN THE 1970s AND THE 1990s

### *1.7.1 THE EUROPEAN POLITICAL COOPERATION OF THE 1970s*

When the Member States of the European Community decided in September 1970 to coordinate their foreign policies through European Political Cooperation (EPC), they faced the problem that the social and political conditions shaping foreign policy in each Member State were extremely diverse. In the absence of a clearly homogeneous European identity, which could form the basis for a common foreign policy, the Member

States sought to identify certain common values, drawn from the process of European Integration, which could serve as the basis for foreign policy coordination. The 1973 Copenhagen Declaration on the European Identity, in which the Member States first sought to define their position and responsibilities in foreign affairs, noted that the Member States were “determined to defend the principles of representative democracy, of the rule of law, of social justice and of respect for human rights”.<sup>53</sup> In the following years, EPC issued innumerable reports and declarations in which the Member States reiterated the principles which guided European foreign policy: adherence to the principles of the United Nations Charter and respect for international law; a commitment to democracy and human rights; the use of diplomacy rather than coercion in international relations; the need for international cooperation to promote economic and social progress; and the need for indigenous peoples to determine their own fate.<sup>54</sup>

The Member States thus placed the principles that underpinned their communal relations at the heart of their relations with the rest of the world. The modern state system, based on sovereign equality and non-interference on domestic affairs, has often been seen as a guarantor of order in international relations as it enables coexistence between states with different values, while foreign policy which seeks to promote human rights has been stigmatized as dangerously idealistic and naïve.<sup>55</sup> The Treaty of Rome, however, had transformed the nature of statehood in Western Europe. The founding member States of the European Community agreed to establish a post-modern state system, whereby they ceded part of their sovereign powers to international institutions and replaced the traditional distinction between domestic and foreign affairs with a system of mutual interference in each other’s internal affairs in the belief that their future security and prosperity could best be ensured by transparency, openness and interdependence.<sup>56</sup> This system was underpinned by respect for human rights, ensured not only through the developing jurisprudence of the European Court of Human Rights but also through adherence to the European Convention on Human Rights, democracy, which was a prerequisite for membership of the Community, and the rule of law, ensured through the independence and legal supremacy of the

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<sup>53</sup> Bulletin of the European Communities 12/1973.

<sup>54</sup> The most detailed examination of EPC documentation has shown that human rights, democracy and self-determination were mentioned in more than half of all EPC statements issued between 1970 and 1989. S Stavridis, *Foreign Policy and Democratic Principles: The Case of European Political Cooperation*, Ph.D. thesis, London School of Economics, 1991.

<sup>55</sup> H. Bull, *The Anarchical Society*, Cambridge University Press, 1977, p.112.

<sup>56</sup> R. Cooper, *The Post-Modern State and the World Order*, 1966, p.89.

European Court.

As far as concern the countries out of the Community, until the end of the Cold War, they have often been suspicious of the concept of human rights precisely because of their European nature. For the developing countries, sovereignty represented a powerful instrument for shaping their national identities and the principal normative and ideological defense against foreign domination. They were generally hostile to any actions, including the promotion of human rights, which could be seen as interference in their domestic affairs. Moreover, countries which had achieved self-determination only after many years of colonial subjugation saw considerable irony in their former imperial masters seeking to base foreign policy on human rights.<sup>57</sup> The Member States decision to place human rights at the center of the emerging European foreign policy guaranteed that they would be drawn into conflict with the developing states if they attempted to match their words with actions.

Despite the rhetoric of a common attachment to human rights in foreign policy, the weight that different Member States placed on human rights in their bilateral foreign policies has varied significantly. Although the dynamic of European integration led the Member States to identify human rights as a central principle of European foreign policy, differences in national interests and attitudes have led each Member of the Community to form its own view on the correct approach to human rights issues abroad. As consequence, despite the achievement of a common European commitment to human rights, the States 'collective human rights policy has remained extremely limited.

### 1.7.2 THE FIRST EEC APPROACH TO HUMAN RIGHTS VIOLATIONS

The first strong concerns for human rights in the external policy of the EEC started to emerge in the late 1970s, when atrocious violations of human rights occurred in countries that were bound to the EEC by virtue of an agreement. These violations occurred in countries such as Uganda, Central African Republic, Equatorial Guinea and

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<sup>57</sup> E.g. in June 1994, Anwar Ibrahim, the Malaysian Deputy prime Minister, complained: "To allow ourselves to be lectured and hectored on freedom and human rights after one hundred years of struggle to regain our liberty and human dignity, by those who participated in or benefited from our subjugation, is willingly to suffer impudence. *Far Eastern Economic Review* The Pacific Century, 2 June 1994, at 20.

Liberia, which were party to Lomé I Convention<sup>58</sup> and entitled by virtue of the agreement, to certain trade preferences and financial and technical aid. Strongly inspired by the public opinion, the then European Commissioner for Development, Cheysson, started to raise the question of human rights in external relations.<sup>59</sup>

The approach towards human rights policy started to appear de facto, without a clear legal basis, and with a focus on punitive measures as a response to violations.<sup>60</sup> Aid to Uganda (which had been granted under the Lomé I Convention) was suspended in response to human rights violations committed by the government of Idi Amin, that according to Amnesty International report, was guilty of provoking thousands of deaths and of using tortures as a widespread practice. Thus, in 1977 the EEC saw its own development aid was benefiting a government involved in atrocious violations of human rights without knowing how to react. The main preoccupation at this point was the misuse of EEC funds, meaning the fear that these funds were used in such a manner as to contribute to human rights violations. Politically, the EEC had to respond to the accusation that, through its assistance, it was in fact helping to perpetuate repression in such countries. Legally speaking, the EEC became forced to consider whether it was to continue to comply with its treaty obligations.

Six months later, the Council agreed to take steps within the framework of its relationship with Uganda under the Lomé I Convention “to ensure that any assistance given by the Community to Uganda does not in any way have as its effect a reinforcement or prolongation of the denial of basic human rights to its people.”<sup>61</sup> The statement, successively defined as the “Uganda Guidelines”, shaped a new EEC approach. The Community was committed to highly respect the principle *pacta sunt servanda*, and for this reason there was no intention of suspending the agreement.

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<sup>58</sup> The first Lomé Convention (1975-1980) provided Community support for the aspirations of African, Caribbean and Pacific States toward a New International Economic Order. The preamble included the language of the 1974 UN Declaration on the Establishment of New International Economic Order. The Commission, as part of its support for the developing countries, rejected any reference, which could constitute an interference in the internal affairs of these countries.

T.King, *Human rights in the Development Policy of the European Community: Toward a European World Order?*, vol.XXVIII, 1997, p.53.

<sup>59</sup> K. Arts, *Implementing the Right to Development?*, *Human Rights in Developing Countries*, Nordic Human Rights Publications, Kluwer Law International, 1996, p.50

<sup>60</sup> The EEC had also reacted to violations of human rights in Chile after Pinochet's bloody coup. Debates in the European Parliament signalled alarm and concern about atrocious human rights violations in Chile. The discussions concerned the question of continuing economic aid to Chile and maintaining an EEC Delegation office in the capital. Although food aid to Chile was never interrupted, the European Community operations in the Santiago office were significantly reduced. The EEC office in Latin America was relocated to Caracas. Amy Young Anawaty, *Human Rights and the ACP-EEC Lomé II Convention*, New York University Journal of International Law and Politics, No.1 vol.13, 1980., p.96.

<sup>61</sup> Statement of the Council, Bulletin EC of 21.06.1977.

However, the Uganda guidelines were characterized by a public condemnation of the situation and by the threat that steps could be taken within the framework of the agreement. But these guidelines remained ambiguous. They neither mentioned any possible legal basis for taking steps, nor did they clarify the types of violations that could be considered serious enough to justify any action.<sup>62</sup>

The Lomé I agreement, which was the basis for the relations with Uganda, remained in force, although development aid was partially suspended.<sup>63</sup> The significance of the policy imposed on Uganda was that latter became of general application.<sup>64</sup> However, integration of human rights concerns into the EEC external relations policy was done reluctantly and in small steps. A second test was provided by violations of human rights occurred in Central African Republic, where, after a first denial of the Commission to suspend its cooperation programme, it decided to finally refer to Uganda Guidelines. In short, the EEC's approach toward human rights began to emerge as a response to atrocious violations of human rights which had occurred in countries bound by bilateral agreements and during this period, the approach was characterized by a scrupulous respect of the principle *pacta sunt servanda* which always used to prevail. Despite this, part of the development aid was suspended in exceptional cases as a response to atrocious and systematic violations of civil and political rights, in particular, the right to life. Often the EEC tried to readdress part of the aid through non-governmental organizations (NGOs), in order to ensure that the aid benefited the population and not the government. The primary concern at this stage was to prevent EEC funds from being involved in violations. European public opinion, often channeled through the Parliament, was instrumental to that effect. Reports of NGOs, such as AI, were taken as the basis for issuing condemnations. Finally, if suspension of some funds was undertaken, this was done unilaterally by the EEC. Neither dialogue nor consultations with the other side were held. In addition, the legal basis for the suspension was not clear.<sup>65</sup>

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<sup>62</sup> T.Kings, *Human Rights in the Development...*, p.112.

<sup>63</sup> A number of projects in Uganda began to be scrutinized by the Commission in order to ensure that the Government did not misuse aid. The EEC decided to freeze aid worth 6.5 million pounds for the improvement of Uganda's transport system. Even though the aid project was initially intended to improve Uganda roads, there was a fear that the vehicles might be used by the regime to transport political prisoners. The Guardian, *EEC halts Uganda aid* of 23 June 1977

<sup>64</sup> Meno Kamminga, *Human Rights and the Lomé Conventions*, Netherlands Quarterly of Human Rights, No.1, 1989, p.30.

<sup>65</sup> Ibid., p.34.

### 1.7.3 THE NEGOTIATION OF LOMÉ CONVENTION II AND III

Thanks to the Uganda guidelines, and to the emerging internal concern for human rights, the idea of a clause on this matter was included in the new negotiations of the Lomé agreements. The three institutions, the Parliament, the Council and the Commission, had issued a joint declaration in which they stressed the prime importance they attach to the protection of fundamental rights and their powers and in the pursuance of the aims of the EEC.<sup>66</sup> This declaration reflected the case law of the Court, and was thus primarily intended to have effects in the internal field. It stated:

- 1. The European Parliament, the Council of Europe and the Commission stress the prime importance they attach to the protection of fundamental human rights, as derived in particular from the Constitutions of the Member States and the European Convention on Human Rights and Fundamental Freedoms.*
- 2. In exercise of their powers and in pursuance of the aims of the European Communities, they respect and continue to respect these rights.*

Under the pressure of Netherlands<sup>67</sup> and Great Britain, in the first ministerial meeting between the EEC and the ACP (African, Caribbean and Pacific) States, which were parties of Lomé I, the former proposed the inclusion of human rights references in the New Convention. Some moderates accepted to open discussion on the matter, but opposition was stronger, and, at the end, in a climate of confusion, the ACP/EEC consultative Assembly approved a final declaration affirming that there would be some mention to the UDHR in the new Convention. Nevertheless, the declaration had short life due to the unilateral resolutions of the ACP Council of Ministers, who considered the Lomé Convention to be essentially an economic agreement and therefore inappropriate for human rights discussion.<sup>68</sup>

When formal negotiations for the renewal of Lomé were launched in July 1978, Commissioner Cheyson proposed the inclusion of a reference in the preamble to the

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<sup>66</sup> Joint Declaration of the European Parliament, the Council of Europe and the Commission in OJ C 103/1 of 27.4.1997.

<sup>67</sup> In 1979 The Dutch Government approved its first internal memorandum on human rights in its foreign policy, which explicitly emphasized its commitment to promote human rights as a part of its overall foreign policy. Peter R. Baehr, *The Role of Human Rights in Foreign Policy*, Macmillan Press LTD, 1996, pp. 85-89.

<sup>68</sup> René J.H. Smits, *The Second Lomé Convention: an Assessment with Special Reference to Human Rights*, *Legal Issues of European Integration*, No.1, 1980, p.50.

most fundamental rights, together with a unilateral declaration by the EEC in which it would reserve the right to publicly condemn violations of such rights. The then Nine Member States had agreed to incorporate a modest human rights reference in the preamble<sup>69</sup>. At the opening of the negotiations, the EEC summarized the general view of the Member States in the following terms: "These ACP-EEC relations must be founded on the principles that form the cornerstone of liberty, justice and peace in the world as incorporated in the UN Charter and the UDHR."<sup>70</sup>

Although the Nine agreed on the inclusion of human rights references, the Member States were divided on the legal effect that such a reference should have taken. Opposing Netherlands and Great Britain there were States as Belgium, France and Germany, which preferred no more than a short and vague reference to human rights. According to Belgium human rights would have created an interference with internal affairs, while France didn't agree on the creation of a link between aid and human rights. Of Course as far as concern the countries outside Europe, those as Uganda, Central African Republic, Ethiopia and Sierra Leone, their position were even more stronger than the French one, and so contributed to amplify the battle that EEC was fighting but that had already lost since the beginning. The arguments invoked by the ACP side in order to oppose human rights references were the following: 1. Lomé was mainly a forum for economics and trade. Human rights issues had no place in an agreement on trade and economic cooperation. It was the United Nations, and not the EEC, which had the necessary competence in the area; 2. Human rights were used as a weapon during the Cold War and could be easily amenable to manipulation; 3. EEC countries also violated human rights; they placed too much emphasis on civil and political rights, discriminating against economic, social and cultural rights.<sup>71</sup>

Not only were the ACP countries reluctant to accept the inclusion of human rights references in the new agreements, but also the European Community itself was divided. As it has been pointed out already, there were disagreements amongst the Member States on the legal value to attribute to the references. In addition, the attempt to criticize the human rights record of recently decolonized countries was , at that time an issue of enormous political sensitivity.

In the joint parliamentary meetings, that saw the presence of both the EEC and ACP

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<sup>69</sup> A.Y.Anawaty, Human Rights and the ACP-EC..., p.60.

<sup>70</sup> Ministerial Conference Opening the negotiations of the New ACP-EEC Convention.

<sup>71</sup> Elena Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff Publishers, 2003, p. 51.

countries, the question of human rights became with the years a always more important subject of discussion. At the same time, consequently to the parliamentary declaration that emerged as a result of a meeting, the European electorate became always more the instigator of a human rights policy, which was channeled through the Parliament. After its first direct elections in June 1979, the Parliament gained legitimacy and got the opportunity to speak more strongly in favor of human rights.<sup>72</sup>

The year 1979 was characterized on one side by significant internal pressure coming from European public opinion, which could not be ignored; on the other there was indirect external pressure from Carter Administration and its emphasis on human rights in US foreign policy. In the absence of truly legislative powers, and coinciding with its first direct elections, the Parliament became the main advocate for the setting-up of a human rights policy in the external sphere for the European Economic Community. However, the Parliament had to face reality: at that time the EEC was not able to establish a human rights policy, and this was proven by the fact that the Lomé II Convention did not include any references to human rights.<sup>73</sup> The external and also internal<sup>74</sup> opposition to the inclusion of Human rights and the opposite side represented by EEC states such as Netherlands and UK which sustained human rights legal inclusion on the Convention, pressed the EEC to solve the question through vague internal declarations. But these declarations did not modify the EEC's philosophy, and left enact the so-called "Uganda Guidelines" doctrine. At the same time, the European public opinion was increasingly pushing for the inclusion of human rights references in the Convention. The result was an increasingly intense debate on the place of human rights in development cooperation, which took place in the Community institutions and, in particular, within the European Parliament.

Negotiations for the renewal of Lomé II Convention started at the end of 1983, the European Parliament strongly requested the Commission to pressure the ACP countries into accepting binding human rights references in the new Convention.<sup>75</sup> Debates continued to see on one side the EEC highlighting the necessity of civil and political rights, and on the other the ACP side, stressing its main concern for economic social and cultural rights. However, something during those years in the global scenario had changed. In 1981, in fact, the African Charter of Human and People's

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<sup>72</sup> Ibid. p. 53.

<sup>73</sup> There was merely a reference to the UN Charter in the preamble of the Convention.

<sup>74</sup> E.g. France

<sup>75</sup> Resolution of the European Parliament "*On Human Rights in the World*" OJ C 161/1 of 20.6.1983, p.64.



rights was signed in Nairobi, showing certain commitments of those countries in human rights. Thus a new approach was taken: instead of blocking the issue, as it had been the case in the Lomé II negotiations, the ACP countries agreed to discuss human rights issues, imposing however their own conditions. Economic, social and cultural rights, as well as rights to development, for example, had to be included as human rights, also the conditions of ACP workers in the EEC had to be considered a human rights issue. In other terms, the ACP countries began to accept a human rights debate but always with some reservation and always sustaining the EEC wasn't the appropriate entity to foster and implement human rights. Finally the EEC had to retreat several steps from its first demands, arriving at the end of the negotiations, asking only for some references to the UN Charter and the UDHR. Once again human rights obtained political rather than legal values.

## 1.8 THE EUROPEAN PARLIAMENT AFTER THE DIRECT SUFFRAGE

Since the 1970s the European Parliament (EP) had been in charge of dealing with questions of human rights in the world. However, it was not until the 1980s, after the first direct elections of the EP, that the human rights question started to gain importance. The Parliament began to receive a large number of reports of human rights violations from the entire world. In order to deal with these questions, a Parliamentary Working Party on Human Rights was set up, and later on this working group was upgraded to the status of "subcommittee".<sup>76</sup> The election of the first European Parliament by direct suffrage represented a turning point in the creation of a human rights policy. Enjoying a new democratic legitimacy but lacking political power, the Parliament saw human rights as an issue that could draw attention to the Parliament's role as guardian of democratic values.<sup>77</sup>

Human Rights became an important potential vehicle for integration, in the Parliament's eyes, as they were common to all Member States. They formed part of the European vision and became a factor of identity. This newly discovered identity in human rights terms began to export the values it represented. In May 1983 the Parliament issued its

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<sup>76</sup> *Memorandum European Parliament and Human Rights*, European Centre, Kirchberg, Luxembourg, March 1989, p.8.

<sup>77</sup> T.King, *Human rights in the Development Policy of the European Community: Towards a European World Order?*, NYIL, 1997, p.57.

first report on “human rights in the world” in which it deplored the violations of human rights happening in the five continents.<sup>78</sup> Since then, reports on human rights in third countries have been drafted annually. The first report dealt with both the political and legal legitimacy of invoking human rights concerns. Concerning political legitimacy, the parliament was said to be an institution at that point directly elected by citizens, which would be expected to deal with human rights questions.<sup>79</sup> Regarding legal legitimacy, the Parliament affirmed that the basis for dealing with human rights questions was supported by international law. The parliament identified an EEC duty to deal with these questions, which derived from the UN Charter and from the Bill of Rights. As a response to its electorate, the Parliament was building up a principle of European Responsibility: “Fundamental human rights are universal and the Community has a duty to encourage respect for this rights and in particular in countries with which it has close ties”.<sup>80</sup>

The Parliament invited the Commission to draw up proposals aimed at incorporating human rights considerations into external relations with a view to the gradual establishment of a comprehensive human rights policy. The first report “on human rights in the world” has been important for several reasons: Firstly, it has represented the starting point of Parliamentary pressure for the setting up of a true human rights policy. Secondly, it has confirmed that the main instigator of human rights concerns was European public opinion, the demands of which were faithfully channelled through the European Parliament. Third, it has demonstrated that the search for legitimacy couldn’t stop with political considerations, but had also to be grounded in international law. Finally it has illustrated the Parliament’s active contribution to the establishment of a genuine principle of European responsibility. From 1983 onwards, parliamentary resolutions on human rights began to rise. In June of that year, the Joint EEC/Latin America parliamentary conference adopted a declaration, which affirmed that cooperation between these parties had to rest on common values, “such as the defence of human rights”. The declaration also affirmed that one of the aims of the

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<sup>78</sup> The report was divided into several parts. Firstly, it provided an overview of the motions of resolutions issued on to violations of human rights in the world enacted after 1979. Secondly, there were a number of arguments advanced in order to justify the report. Thirdly, it summarised violations of fundamental rights in countries of all continents: countries that had close ties with the Community and South Africa; countries of the American continent; countries of Asia; African and Middle Eastern countries, which were not party to the Lomé Convention and did not have preferential agreements; Lomé Convention countries; countries which had signed the Helsinki Final Act and Albania. Finally, there was a survey of EEC policy including European political cooperation and action before United Nations, and a survey of the actions undertaken by the Parliament itself.

<sup>79</sup> The Parliament received thus increasing pressure from NGOs.

<sup>80</sup> Resolution of the Parliament “on human rights in the world” OJ C 161/58 of 20.06.1983.

political cooperation was to achieve respect of human rights.<sup>81</sup> In its second report on human rights in the world, the Parliament recalled public opinion demands on a policy on human rights. But then it added an economic rationale: the EEC (in contrast to other regional or universal organizations) had considerable political and economic means at its disposal, which could be used to enhance respect for human rights. Consequently, it called on the Commission to study: "The current and potential modalities for linking community aid with minimum conditions of human rights protection, through the provision of food supplies after disaster or during emergencies should not be made conditional on this".<sup>82</sup>

In a further resolution the Parliament regretted that references to human rights in the Lomé Convention were not more specific and did not have a more definite value. Human rights references didn't have to be reduced to the Lomé context, but at the same time, a reference in Lomé would have set up a precedent and lead to similar provisions being incorporated in other external agreements. Although theoretically human rights were indivisible, the Parliament affirmed that civil and political rights were a prerequisite to the full enjoyment of economic, social and cultural rights. Consequently, the Parliamentary human rights focus became, in particular, limited to civil and political rights. This has been demonstrated by the fact that when the Parliament used to condemn human rights violations all over the world, it was only the latter category which were brought to attention. This selectivity had to be understood within the context of the pressure of public opinion, which focused on the most shocking of violations.<sup>83</sup> In a final resolution "on the creation of the framework for dialogue to foster observance of internationally accepted standards of human rights in

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<sup>81</sup> The VI EEC-Latin America Parliamentary Conference was held in Brussels on the 13-16 June 1983.

<sup>82</sup> T.King, *Human Rights in the Development Policy...*, p.62.

<sup>83</sup> Ibid., In the framework of the three first resolutions of human rights in the world, the Parliament emphasised three fundamental rights, which were, the right to life, the right of respect for the physical and moral integrity of the person and the right to a fair trial. However, the Parliament affirmed that human rights were indivisible. On the involvement of the Parliament in foreign policy issues, King has argued that "the willingness of legislators to speak independently rather than diplomatically has underpinned government's traditional reluctance to cede control of foreign affairs to the legislature, as they fear disruption from below of the orderly pursuit of national interest. The public, it is argued, tends to think in terms of good and evil, a way of thinking totally opposed to the successful conduct of foreign policy, which requires a long term view, frequent compromise and, above all, the unrelenting promotion of the national interest. To allow legislative control of foreign policy would be to permit members of parliament to project the ignorance and caprices of the electorate into decisions of crucial national importance. The danger of disruption from below in foreign policy was even greater at the Community level than at the national, as the identity which exists in national parliaments between the executive and the majority in the legislature does not exist at the European Parliament. Owing no political allegiance to the executive organs of the Community, MEPs enjoy an unfettered freedom to criticise all aspects of executive action and are far more likely than national legislators to view human rights as an all-important goal in foreign relations.

the European Community and those countries with which it has closer ties<sup>84</sup> the Parliament set out the basis of its strategy. When the EEC was concluding association, preferential and cooperation agreements with third countries, it was not merely creating commercial ties. Those agreements had a stronger meaning; they could have been a factor for peace and stability in international relations. The EEC had to be vigilant towards respect for human rights on the world. This implied that its agreements would have been more meaningful if they were to include specific references to common commitments on human rights. The Parliament thus strongly urged the initiation of dialogue on human rights matters as well as the insertion of references to human rights into association, preferential, and cooperation agreements with third countries. As to the content of those provisions, the proposal had to refer to the International Covenants and be formulated on bilateral terms. Although the idea of including human rights references in the body of external agreements was not new, this resolution represented the first time that the Parliament explicitly demanded an express inclusion of human rights instruments in the body of the whole range of agreements concluded by the EEC.

## 1.9 LOME' IV AGREEMENT: THE CREATION OF A HUMAN RIGHTS POLICY

In its 1985/1986 reports on human rights in the world, the Parliament had requested the Commission to submit a proposal for a Community act, which would have provided a clear legal mandate for the Community in the field of human rights. The Commission, however, didn't give a positive answer to the request. According to the Commission, a legal act creating a human rights policy as an end in itself could have well exceeded the objectives of the EEC, which did not include the promotion of human rights. However, the Commission drew a distinction between taking human rights issues into account in the exercise of its existing powers (which it could do) and setting up a genuine Community policy to promote human rights, for which the Treaty of Rome provided no mandate.

In the subsequent years the Commission was newly invited to present a proposal in "the appropriate form of Community act" which would have given legal force to the

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<sup>84</sup> Resolution "on the creation of a framework for dialogue to foster observance of internationally accepted standards of human rights in the European Community and those countries with which it has close ties" in OJ C 127/126, 14.05.1984.

1977 and 1986 Declarations on Human Rights, the references in the preamble of the Single European Act, and the references to human rights in the preambles of certain agreements with third countries.<sup>85</sup> Except for the 1977 inter-institutional declaration on human rights, these documents referred to the necessity to take human rights into account, in particular, in the external relations of the EEC. These documents, and their content remained largely political and no duties to pursue an active external policy derived from them. The human rights clause, which was included in the Lomé IV agreement for the first time, reflected this ambivalence. Even though in principle it had a legal nature, the authentic political meaning of the reference was reflected through its elaborated and lengthy wording.

In the light of the demands of the Parliament, during the last years of the 1980s, and whilst nevertheless scrupulously respecting the limits of Community competences on the matter, the Commission proposed the inclusion of a human rights clause in the Lomé IV Convention. Then the Single European Act (SEA) granted new powers to the Parliament, in particular, the right to assent to association agreements by an absolute majority of its members.<sup>86</sup> When the SEA entered into force, it soon became clear that the Parliament was only going to give its assent to agreements containing human rights provisions. The new provision of the SEA thus represented a powerful weapon in the hands of the Parliament, which would have helped it to achieve its desire for human rights provisions to be inserted into its agreements.<sup>87</sup>

In 1989, the Lomé IV agreement was signed with a specific human rights clause in its body. The clause contained in Article 5, was the result of a decade of intense internal discussions and negotiations in joint ministerial and parliamentary bodies, as well as external pressure from the Parliament. On the other hand, the EC's internal commitments on human rights made its position stronger, more confident, and politically credible when it requested the inclusion of human rights references in the body of Lomé IV.<sup>88</sup> At the same time, economic conditions in the ACP states had collapsed, making those countries very dependent on foreign aid in meeting basic foreign exchanges needs, domestic requirements and recurring costs. By this stage,

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<sup>85</sup> M. Zwamborn, *Human Rights Promotion and Protection Through the External Relations of the EC and the Twelve*, Netherlands Quarterly for Human Rights, No.1, 1989, p.15.

<sup>86</sup> J. Rideau, *L'Union Européenne et les droits de l'homme*, Académie de Droit International Recueil des Cours, tome. 265, 1997, p.361.

<sup>87</sup> A. Clapham, *Human Rights and the European Community: a Critical Overview*, Baden-Baden, Nomos, vol.I, 1991, p.72.

<sup>88</sup> These commitments were gathered in particular in the preamble of the SEA; the regular reports of the Parliament on Human Rights in the world, the Council 1986 statement on human rights and finally the Council annual reports on human rights addressed to the parliament.

the political situation of the ACP countries had changed almost beyond recognition. The Soviet Union was increasingly reluctant to support these countries and their bargaining power had become very weak.<sup>89</sup> On the other hand, developments in international law made the Latin American countries more familiar and confident with human rights questions. Amongst these developments there was the already mentioned UN Declaration on the Right to Development, and the entry into force of the African Charter on Human and People's Rights.<sup>90</sup> Finally, the references to human dignity in Lomé III encouraged the belief that both parties had already set up commitments in the field of human rights. In other words, a precedent had somehow been created, allowing the Community to argue that the issue was no longer new.

The new economic and international climate undermined ACP resistance to European demands for the incorporation of human rights and democracy in development cooperation relations.<sup>91</sup> The starting point of this trend was an ACP ministerial declaration adopted at the end of 1987. The Kingston Declaration, as it was called, referred to human dignity and included a programme of action against apartheid. It thus included the principles of equality and human dignity, and recalled the commitments undertaken in the Annex to Lomé III. The Declaration not only favoured the Community's demands for stronger human rights references, but also was used to ask the Community to impose sanctions on South Africa in response to those countries' apartheid practices.

One year later, a joint ACP/EEC conference was held on the occasion of the 40<sup>th</sup> anniversary of the UDHR. This Conference was entitled "on human dignity and the ACP/EEC Convention".<sup>92</sup> But this time the European Community action was stronger and made the ACP countries less reluctant to accept human rights references; now their claim with respect to development was a human right and their concern for the abolition of the apartheid was, beyond doubt, a human rights matter.<sup>93</sup> At the opening of the Convention negotiations both the EEC and the other countries had agreed to highlight the importance of human rights, the link between the promotion of human

<sup>89</sup> T.King, *Human Rights in the Development Policy...*, p.64.

<sup>90</sup> The African Charter on Human and People's Rights had entered into force on 21 October 1986.

<sup>91</sup> Demetrios James Marantis, *Human Rights, Democracy and Development: the European Community Model*, Harvard Human Rights Journal, vol.7, 1994, p.8.

<sup>92</sup> Europe No.4910, *Human Rights: Seminar of the foundation ACP/EEC*, of 8 December 1988, p.4.

<sup>93</sup> However there was still some fear of neo-colonialism. During the conference, the ACP side explained that they had ideological reasons to contest human rights. Claims on respect of human rights they could breach their sovereignty and their political independence. See *Spécificité et Universalité des Droits de l'Homme: un Séminaire de la Fondation pour la Coopération Culturelle ACP-CEE*, Le Courrier No.114 of Mars-Avril 1989, p.10.

dignity and development, and the interdependence of categories of rights.<sup>94</sup> With the last Lomé Convention, thus, the discussion moved to a different level. The question was not anymore if to include human rights references, but was about the content of those references. In other words the 1990s signed one of the most relevant changes in human rights history, seeing human rights as a certitude that has to be regulated instead of a facultative clause.

Finally at the end of the 1989, the Lomé IV Convention was adopted with an innovative, although rhetorical, human rights clause within the body of the agreement. The preamble added two paragraphs. One referred to universal instruments (the UDHR and the UN Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights) and the other mentioned regional instruments binding each of the Parties, the African Charter for most of the ACP states and the ECHR for the EC side.

Under the heading “ Objectives and Principles of Cooperation”, the first ever human rights clause was divided into three long paragraphs. The first recalled the link between human rights and development and the commitment to adopt a positive approach. The second paragraph affirmed the Parties’ attachment to human rights and the principle of indivisibility of categories of rights, whether civil and political or social or economic, with special emphasis placed on the latter category of rights. Finally, a third paragraph affirmed the positive approach to be followed and announced that financial resources had to be allocated in order to promote human rights.<sup>95</sup> Article 5 also mentioned good governance for the first time as a particular aim of cooperation operations excluding it, however, from the essential elements of the agreement. Most importantly, it implemented the two-track approach to development cooperation which the Council laid out in its Resolution on Human Rights, Democracy, and Development.

The negative side of the coin was that a suspension procedure to be applied in the event of persistent violations of human rights, was not included.<sup>96</sup>

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<sup>94</sup> *Lomé IV: Conseil Ministériel ACP-EEC de Brazaville: le Déblocage Politique des Negociations*, Le Courrier No.114 of Mars-Avril 1989, p.4.

<sup>95</sup> Appendix II, *Abstracts for the Fourth ACP-EEC Convention*, Lomé 15 December 1989 in NQHR, No.3, 1990, p.326.

<sup>96</sup> However, some authors have argued that the Convention allowed indirectly for the suspension of its privileges. Human Rights were considered, in reality, an essential element and condition for development and objective of the cooperation. Article 10 provided that the parties “should refrain from any measure which can jeopardise the attainment of the objectives of the Convention”. Consequently, the EC could have suspended privileges to the ACP states violating such obligations, following the procedure of previous consultations enshrined in Article 12. See Joost Korte, *Human Rights and the Fourth ACP-EEC Convention (Lomé IV)*, NQRH, No.3, 1990, p.294.

Because there was no mention of a right to suspend cooperation in the case of violation of human rights, it seemed that the EEC's major interests were not represented at this stage. Human Rights conditionality was, from now on, enshrined in a bilateral agreement-and thus in a legal text. Traditionally of a highly political character, conditionality now had a legal dimension. Another particularity was the emphasis on positive measures. There was no mention of the possibility of suspending the agreement in the event that the parties should have violated human rights. However, even if this was not stated expressly, this seemed to have been the final intention of the EEC. It is implied from the previous negotiations for the Lomé agreements that the EEC wished to grant itself the possibility of suspending the agreement on the basis of the clause.<sup>97</sup>

Lomé IV agreement thus marked the beginning of both economic and political conditionality in EU development policy. In previous agreements, the ACP countries had successfully prevented the EU from introducing clauses on democracy and human rights. Likewise, they had preserved the right to determine their own aid priorities thereby excluding the incorporation of structural adjustment programmes implemented by the International Monetary Fund and the World Bank. Lomé IV, by contrast, included provisions on democracy, human rights, and the rule of law for the first time, without, however, linking them to specific sanctions. In cases of violation, the EU undertook to examine appropriate measures, which, however, were not specified. Lomé IV required a mid-term review of the financial protocol of agreement, which the EU used to strengthen political conditionality as well. For violations of democracy, human rights and rule of law, however, the EU reserved itself to invoke the suspension clause several times in the 1990s, e.g. against Nigeria, Rwanda, Burundi, Niger, and Sierra Leone.<sup>98</sup>

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<sup>97</sup> E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff Publishers, 2003, p.84.

<sup>98</sup> T. A. Borzel and T. Risse, *One size fits all! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law*, Stanford University, 2004, p.12.





## CHAPTER II

### ENTERING THE 1990s: THE PATH TOWARD A NEW EUROPEAN ASSET. WHICH CONSEQUENCES IN THE HUMAN RIGHTS FIELD?

#### 2.1 THE END OF THE COLD WAR

The institutionalization and consolidation of an EEC human rights policy in the agreements with other countries coincided with the end of the cold war, and the upheavals in Central and Eastern Europe gave it the final impulse.<sup>99</sup>

The environment created by the end of the cold war further favoured the human rights cause. International relations were injected with new found potential due in particular to the new international setting which finally allowed the UN to carry out its foundational purpose, including the promotion of human rights and democratic freedoms.<sup>100</sup> Bilateral relations between the EEC and the Central and Eastern Europe changed dramatically, leading to the signing of new economic and trade agreements which reflected such changes. In addition, the Western Economic Summit of the G7, which in 1989 took place in Paris, decided to grant assistance to the economic restructuring of Central and Eastern Europe, and mandated the Commission to coordinate the operations.<sup>101</sup> The seven major industrial nations affirmed that human rights were a matter of international concern and committed themselves to encouraging and promoting universal respect for human rights and fundamental freedoms.<sup>102</sup>

Following the G7 mandate, the Commission then acquired a large degree of responsibility to consolidate the transition process in Eastern Europe, with a human

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<sup>99</sup> K. Tomasevski, *Aid to Eastern Europe*, in *Human Rights in Developing Countries*, Nordic Human Rights Publications, Kluwer Law International, Yearbook 1993, p.21.

<sup>100</sup> B. Andreassen and T. Swineheart, *Introduction in Human Rights in Developing Countries*, Nordic Human Rights Publications, Kluwer Law International, Yearbook 1990, p.8.

<sup>101</sup> XXIIIrd. General Report on the Activities of the European Communities, External Relations, third chapter, 1989, p.718.

<sup>102</sup> Western Economic Summit, Bulletin EC 7/8-1989, p.131.

rights component attached. The European Council meeting in Madrid affirmed the determination of the European Community in playing an active role in supporting and encouraging positive changes and reform. Meeting in Strasbourg at the end of the year, the European Council spoke of a “common responsibility which devolves on them in this decisive phase of the future of Europe”.<sup>103</sup> Reacting to this challenge, the Commission very soon proposed the conclusion of new agreements to support the reforms,<sup>104</sup> and the proposal was fully endorsed by the Council. In a further Communication, the Commission linked the implementation of these agreements to compliance with principles of democracy and economic liberalization in future association countries.<sup>105</sup> Thus, by wielding its economic and political instruments on a conditional basis, the EC hoped to encourage its eastern neighbours to carry out reforms and prevent a return to communist rules. The success of reforms was considered crucial for ensuring long-term stability and security in Europe.<sup>106</sup>

The events in Central and Eastern Europe contributed, at best, to fill the Community with a certain sense of responsibility with respect to the promotion of human rights worldwide, which did not stop at the European borders. This sense of responsibility was however, the achievement of a process that had already begun. The new generations of agreements of the 1990s, in fact used to include human rights references. Facing reluctance from some of the partners to have these references included, the EEC used similar strategies as those it had used in the case of Lomé. Human Rights concerns were already part of the *acquis*. This was illustrated by numerous preambles of the agreements signed in the 1980s and EEC internal documents. The challenge was then to find a more appropriate wording for these concerns, which implied their movement from the political into the legal sphere.

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<sup>103</sup> Declaration of the European Council meeting in Strasbourg, Bulletin EC 12-1989.

<sup>104</sup> Commission Communication on the impact of recent developments in Eastern Europe on the Communities relations with the countries concerned, of 18.01.1990 in Bulletin EC 1/2 – 1990, p.70. On the very same day the Parliament approved a resolution on Central and Eastern Europe in which insisted that measures to help those countries should be taken on the basis of their needs as well as their commitment to undertake political and economic reforms.

<sup>105</sup> Commission Communication “on the impact of recent developments in Eastern Europe on the Communities relations with the countries concerned” of 18.01.1990 in Bulletin EC 1/2 – 1990, p.70.

<sup>106</sup> However the EEC had already used conditionality patterns, albeit implicitly, for the purpose of accession of Greece, Portugal and Spain. E. Fierro, *Human Rights Approach...*, p. 93.

In the delicate political climate of the early 1990s, the European Economic Community decided to contribute to the consolidation of democracy and human rights promotion worldwide through for example, cooperation agreements.<sup>107</sup>

As the European Council had recognized, the end of the decade of the 1980s was marked by contrasts in the field of human rights. According to different authors “the end of the cold war has had a dual impact on international human rights, contributing both to violations of rights and renewed efforts to ameliorate those violations.”<sup>108</sup> On the one hand, the European Community’s actions were favored by a climate of hope and euphoria, which was provoked, in particular, by the perspectives of democratization of the whole European continent. On the other hand negative events illustrated the still present lack, namely, the absence of legal tools to responds to challenges. Reactions to human rights violations were thus necessary, but in the absence of a satisfactory internal framework, the EEC used to react, during those years, on a case-by-case basis, following a flexible approach.

The collapse of communism in Europe had a domino effect, as a number of previously hesitant states decided to accept human rights treaties.<sup>109</sup> The post-Cold war era created also an environment in which old arguments came back to light. The already mentioned G7 Western Economic Summit at this time affirmed that human rights were a matter of international concern. The 1975 Helsinki Final Act mandated respect for human rights, on the one hand, and respect for the principle of non-intervention in internal affairs, on the other. The first line of defence of Eastern European states against any criticism of their human rights record was to invoke the second principle (it constituted interference in their domestic affairs), thus, any discussion on human rights was continuously at stake.<sup>110</sup>

In 1991, the OSCE countries met on the occasion of the Conference of the Human Dimension in Moscow.<sup>111</sup> They agreed on a text in which they affirmed that issues

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<sup>107</sup> For instance, the European Council meeting in Strasbourg issued a Declaration on the eve of the general elections in Chile in which it declared its intention to contribute to the economic and social development of a democratic Chile and its intention to use its new agreement for that purpose. See Declaration of the European Council meeting in Strasbourg. See note 27

<sup>108</sup> David P. Forsythe, “*Human Rights After the Cold War*”, NQHR, No. 4 , 1993, p.394.

<sup>109</sup> Ibid. p.397.

<sup>110</sup> Jan Helgesen, *Between Helsinki and beyond? Human rights in the CSCE Process*, in *Human Rights in a changing East/West Perspective*, 1990, pp.241-264.

<sup>111</sup> The Vienna concluding documents of the Commission on Security and Cooperation in Europe (CSCE) mandated several conferences to be held on the subject of the human dimension of the CSCE. The first of these conferences was held in Paris from the 30 May to the 23 June 1989, but it failed to adopt

relating to human rights, fundamental freedoms, democracy and the rule of law were not internal, but of international concern. The Moscow document, however, remained a political commitment, without creating legal effects. Inspired by the developments in international law and international relations the Commission, the Parliament and the Council each reaffirmed their firm belief that violations of human rights did justify interference in internal affairs.

## 2.2. THE HUMAN RIGHTS CLAUSE OF 1991

Since the beginning of the 1990s, the EU has intensified its efforts in promoting human rights and democracy introducing democracy and human rights clauses in all its agreements with third countries. While the cooperation and association policy of the EU was differentiated in its goals and strategies, it has been mainstreamed with regard to democracy, human rights, and the rule of law, and quickly moved in all the areas of the EU's external relations. Nevertheless, the already "old" human rights debate continued also in the internal sphere. The question of the status of human rights within the EC/EU in fact reached the top of the political agenda in the 1990s.

In that period, developments on human rights evolved rapidly. At the multilateral level, the Twelve had made, for the first time, a joint intervention in the UN Commission of Human Rights,<sup>112</sup> and declared before the UN General Assembly that their commitment to human rights in the world emerged from the values on which the European Communities were founded. In the internal sphere, the Parliament issued its 1989 Declaration on Fundamental Rights and Liberties, consisting of 28 Articles encompassing civil, political, social and economic rights applicable to all Community nationals. The Declaration was aimed at strengthening the protection of human rights

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a concluding document. The second conference was held in Copenhagen from the 5 June to the 29 June 1990. The third meeting was scheduled in Moscow from the 10 September to the 4 October. See Thomas Buergenthal, *The Copenhagen CSCE Meeting: A new Public Order for Europe*, Human Rights Law Journal, vol.11, 1990, pp.217-218.

<sup>112</sup> Statement by Foreign Ministry of Spain on behalf of the Twelve at the 45th session of the UN Commission on Human Rights, European Political Cooperation, press release, Geneva 22 February 1989. According to the statement "since it is the first time that the Twelve Member States of the European Community address the Human Rights Commission through a single voice, allowing me to recall before this important body of the United Nations that respect for human rights is one of the cornerstone upon which European Cooperation has been built over the past thirty years (...) As we laid down in the 1986 Brussels Ministerial Statement, and have reaffirmed on many different occasions since then, the Twelve are deeply committed to respect, protection and further promotion of human rights and fundamental freedoms, in the context of the principles of parliamentary democracy and the rule of law...".

at the internal level and at affirming a European Identity. To complete the picture, in December 1989, the European Council in Strasbourg adopted a Charter on Social Rights and announced a new stage in the EEC's common commitment to respect human rights.

In 1991 the Commission, ready to face the challenge, issued a communication "on human rights, democracy and development cooperation"<sup>113</sup> which basically gave a mandate to include the human rights clauses systematically in all the agreements concluded by the Communities. However, the mandate was done in the form of a resolution and not as a binding decision. This human rights clause, since then included in all the bilateral agreements of the Community, at the beginning of the 1990s applied to countries of at least three continents. In those years the EC included more or less systematically the human rights clause in its bilateral trade and cooperation agreements with third countries, including association agreements such as the Europe agreements, Mediterranean agreements and the Lomé Convention. A Council decision of May 1995 spelled out the basic modalities of this clause, with the aim of ensuring consistency in the text used and its application, and since then the human rights clause was included in all subsequently negotiated bilateral agreements.

An important reason for including this standard clause in agreements with third countries was to spell out the right of the Community to suspend or terminate an agreement for reasons connected with non-respect of human rights by the third country concerned. Before the human rights clause, the EC had to rely on general international law to suspend an agreement, as happened with regard to Ex-Yugoslavia in 1991.<sup>114</sup>

It has to be underlined that the human rights clause did not transform the basic nature of agreements which were otherwise concerned with matters not directly related to the promotion of human rights. It simply constituted a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, which expressly allowed for and regulated suspension in case of non-compliance with these values. This approach seemed to have been confirmed by the ECJ in the case Portugal v. Council of 1996, where the Court observed that an important function of the human rights clause could have been to secure the right to

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<sup>113</sup> Commission Communication to the Council and the Parliament, SEC (61) 91 of 25 March 1991.

<sup>114</sup> The trade concessions of the 1983 Cooperation Agreement were suspended by Council Regulation (EEC) No. 3300/91 of 11 November 1991 and the whole Agreement by a Council decision, taken together with the Representatives of the Member States, meeting within the Council.

suspend or terminate an agreement if the third state had not respected human rights.<sup>115</sup> In other words, such a clause did not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments that, as general international law, already bound all states as well as the EC in its capacity as a subject of international law.

The basic term of reference for the human rights clause was the Universal Declaration of Human Rights of 1948.<sup>116</sup> As consequence, in a Declaration adopted by the Luxembourg Summit of 12-13 December 1997, the European Council reaffirmed the EU's commitment to the respect and defense of the rights enshrined in the Universal Declaration<sup>117</sup>. Despite the reconnaissance of the clause as an "essential element", its inclusion in the agreements was not sufficient itself to create a solid EEC human rights policy, but it constituted the first step in the right direction. However, the Community efforts were concentrated in the external dimension, highly ignoring the internal one.

The 1989 Parliamentary Declaration, as explained previously, did not obtain a large success and at the same time the adoption of the first parliamentary resolution on human rights within the European Community resulted in controversy. The Community's legal competence was at stake, as was the definition of human rights itself for the Community. By contrast, Parliamentary reports "on human rights in the world" and thus in the external sphere, continued to flow naturally without controversy. The treaty on the European Union, signed in Maastricht in December 1991, (which entered into force in 1993) reflected this ambivalence too.

## 2.3 MAASTRICHT TREATY AND THE NEW LEGAL BASIS FOR HUMAN RIGHTS

The period between the completion of the Single European Act in 1986 and the Maastricht Treaty ratification in 1993 marked seven years of dramatic changes, both

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<sup>115</sup> Case C-268/94 *Portugal v. Council* (1996)

<sup>116</sup> Article 5 of the Lomé Convention IV did not mention the Universal Declaration, but the Declaration, together with the two International Covenants of 1966.

<sup>117</sup> At this regard it should be emphasized that these conclusions did not necessarily imply that each and every word of the Universal Declaration became universally binding. In fact, the standard EC human rights clause referred to "democratic principles and basic human rights, as proclaimed in the Universal Declaration", rather than to the provisions of the Declaration as such.

regionally and globally. As already mentioned, the late 1980's were the final culminating years of the Cold War era. Events such as the fall of communism in former Soviet satellite states and more importantly the fall of the Berlin Wall in 1989 sparked major changes within the perspectives of European integration. The reunification of Germany brought back the feelings of the brutal war years, and a democratization processes begun in all the former communist states, offering new perspectives for closer cooperation in an extended Europe. Furthermore, the growing enthusiasm for a common market was justified by numerous European companies expanding beyond their conventional state borders. The unstoppable momentum toward a unified Germany concentrated the minds of Germany's partners. After initial hesitations, most European finance ministers concluded on the basis of the 1988 Delors Committee Report<sup>118</sup> that economic and monetary union was the best way to harness the economic might of the new unified Germany within the European Framework. Plans for the second preparatory stage of monetary union moved fast. By February 7, 1992, the same year in which the single market was to be completed, the new treaty was ready for signing in Maastricht.

Despite the premises, from a certain point of view Maastricht has been in many ways an unsatisfactory treaty, merging together the very disparate views of member states in a series of awkward compromises, as the protection of fundamental rights illustrates. The many declarations and preambles of the previous fifteen years did not help, as expected, the Treaty to enforce the fundamental rights of European's citizens that were now enshrined at the European Union's core. The European Court of Justice continued to be restricted. In the eyes of at least some member states, the unnoticed activism of the 1970s Court of Justice had, by the 1990s, developed into a threat to national sovereignty. The European Union's evolution toward guaranteeing democracy and human rights was indeed not to the taste of all member states. France and the United Kingdom were far from enthusiastic. The United Kingdom had long opposed any

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<sup>118</sup> In June 1988, the European Council meeting in Hanover, Germany, set up the Committee for the Study of Economic and Monetary Union, chaired by the then President of the Commission, Jacques Delors, and including all EC central bank governors. Their unanimous report, submitted in April 1989, defined the monetary union objective as a complete liberalization of capital movements, full integration of financial markets, irreversible convertibility of currencies, irrevocable fixing of exchange rates, and the possible replacement of national currencies with a single currency. The report indicated that this could be achieved in three stages, moving from closer economic and monetary coordination to a single currency with an independent European Central Bank and rules to govern the size and financing of national budget deficits. See European Commission official website: [http://ec.europa.eu/economy\\_finance/euro/emu/road/delors\\_report\\_en.htm](http://ec.europa.eu/economy_finance/euro/emu/road/delors_report_en.htm)



strengthening of the powers of the European Parliament. Its Conservative government, which was in power from June 1979 until May 1997, was also profoundly suspicious of the ECJ, which it regarded as an instrument to bring about closer integration.

Largely because of the British government's opposition, the jurisdiction of the Court was extended very little if at all by the Maastricht Treaty. Article L of the Treaty limited the scope of the Court's jurisdiction to the existing treaties, as amended by the Maastricht Treaty, and to the interpretation of any conventions made under the intergovernmental third pillar concerning the fields of justice.<sup>119</sup>

This reluctance demonstrated that, despite the governments of the Twelve committed themselves to securing the ratification of the Treaty on European Union before the end of 1992, they underestimated the difficulties that it would have encountered. With the slowdown in growth in 1992, the rise in unemployment rates and the powerlessness of the Twelve to intervene in the civil war in former Yugoslavia, the general conditions were less favorable for a united Europe.<sup>120</sup> The very purpose of the European Union might have been called into question. The hostility of United Kingdom and Denmark, which were the most contrary to the Treaty, and the concern of Germany for the single currency and the attribution of more powers and legitimacy to a "powerful" organ made the signatory phase long and tortuous, but finally ended in 1993 with the opening of a new era for the European Union's countries and citizens.

The premises, nevertheless, already showed that the spirit of this new Union had many difficulties in dealing with a unique policy on the respect of citizens' rights and human rights. The signature of this fundamental change for the European countries was mostly based on economic and strategic issues, making the Member States choose once again the state sovereignty first. The Member's choices that saw the prevail of self interests in front of human rights and democratic principles didn't compromised the new treaty's basis. For the first time in a European treaty, references were made to the individual citizens, thanks to the establishment of a number of rights, even if limited, pertaining to citizens of the European Union. The Treaty in this sense marked an unprecedented milestone in the process of European integration and development. It elaborated and implemented concepts discussed in the previous Single European Act

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<sup>119</sup> S. Power and G. Allison, *Realizing Human Rights. Moving from Inspiration to Impact*. St. Martin's Press, New York, 2000, p.98.

<sup>120</sup> See *Historical Events in the European Integration Process (1945-2014)*, *Hard-won ratification at*: [www.cvce.eu](http://www.cvce.eu)

of 1986, and not only established the European Monetary Union but it paved the way for further developments such as the Treaty of Amsterdam, the Treaty of Nice, and others that were to follow. In practical terms, the Treaty created the notion of European Citizenship with all its benefits and responsibilities, including the freedom to travel and work, the notion of solidarity, the question of social cohesion, etc. It also created the framework for new possibilities of economic exchange and development.<sup>121</sup>

One of the most symbolic innovation of November 1, 1993 , as far as concerned the human rights area, has been the introduction of human rights provisions on the body of the text. For the first time human rights are not relied anymore to the preamble but they obtained their own spot in the treaty. Anyhow the final draft of the treaty had weak provisions in the pursuit of a human rights policy in the internal sphere. A more solid legal basis for the inclusion of human rights clauses was instead related to the external one.

Internally, Maastricht crystallized the already classic jurisprudence of the European Court in the field of human rights. According with the jurisprudence, fundamental rights provided an integral part of the general principles of law ensured by the Court. Article F2 of the Common provision of the TEU provided that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November and as they result form the constitutional traditions common to the Member States as general principles of Community law”.<sup>122</sup>

With regard to external actions, the Treaty stated that it was one of the main objectives of the common foreign and security policy (CFSP) “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”. In the same way it stated the European Community development cooperation policy “shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”

These provisions constituted an advance in the development of an essentially economic Community into a political body. The founding Treaties, in fact, made no explicit reference to human rights or the relevant international instruments; such

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<sup>121</sup> A. Rogobete, *Why is the Maastricht Treaty considered to be so significant?*, Royal Holloway, University of London , 2010, p.126.

<sup>122</sup> B. Brandtner and A. Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, EJIL, No.3 vol.9, 1998, p.74

reference was not going to make an appearance until thirty years later, in the preamble to the Single European Act and then now in the Maastricht treaty, in which political cooperation has been then formally enshrined.

Prior to the Single European Act (1986), in the absence of formal references to these issues, the criteria of human rights and democratic principles were gradually introduced in the Community's external relations through the positions adopted by the community institutions and the heads of states or government. This process had emphasized the legal, political and moral values that made up the European identity, particularly the principles of representative democracy, the rule of law and respect for human rights.<sup>123</sup>

Before Maastricht, within the Community itself, a relevant role had been played by the Court of Justice in compensating for the lack of Community legislation protecting basic rights, by developing a body of original case law in which basic human rights were considered an integral part of the general principles common to the legal system of all Member States, which in turn used to provide the basis for Community law, of which the Court was the guardian. The Court adopted a series of rules in which these general principles were defined as being based on the traditions common to all the nationals' constitutions concerned and on the relevant international and regional instruments, particularly the European Convention for the Protection of Human Rights and Fundamental Freedoms signed on 4 November 1950.

Starting with the SEA, the position adopted by the Community in this sphere became increasingly operational in application, identifying priorities for action and paving the way for the incorporation of respect for human rights in the Treaty on European Union. By way of example, the Luxemburg European Council of 28-29 June 1991 illustrated this commitment by adopting a declaration on human rights that established the principles and the main features of a political platform actively promoting human rights and democratic principles. A few months later, the Council and the representatives of the Member States meeting within the Council adopted a resolution on human rights, democracy and development laying down the guidelines, procedures and priorities for improving the consistency and cohesion of the whole range of development initiatives.

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<sup>123</sup> Historical Archives of the European Union (hereafter HAEU), Angel Viñas Fonds (hereafter AV), Box 81, *Memorandum on the European Union and Human Rights relations*. S.d. s.f. p.2.

<sup>124</sup> Ibid. p.4

Finally, after two Intergovernmental Conferences (IGC) held in Rome in 1990, one devoted to Economic and Monetary Union and the other to Political Union<sup>125</sup>, it was decided that the two parts negotiated separately should be combined into a single Treaty on European Union. Under the Dutch Presidency, the Maastricht European Council of 9 and 10 December 1991 finalised the Treaty, after final legal adaptations and negotiations among experts. On 3 February 1992, the Treaties establishing the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (Euratom) were also amended.

A total of 17 protocols and, in a Final Act, 33 political declarations were annexed. The Treaty was initially scheduled to come into force on 1 January 1993 at the earliest, provided all the European Community Member States had ratified it. However as happened for the signatures, ratification by parliaments or by referendums proved to be more difficult than envisaged, and the Treaty of Maastricht did not come into effect until 1 November 1993.

At the same time, accession request had already started. For their part, the Twelve looked favorably on the accession of the applicant countries, as far as they were all democratic, their standard of living was high and they would therefore, in theory, have less need for Community subsidies. The European Council, meeting in Copenhagen in June 1993 for confirmation of some applicant countries<sup>126</sup> also noted that several of the countries of Central and Eastern Europe that were emerging from the disintegrating Soviet bloc wanted to become full members of the European Union, and set explicit conditions based on human rights and democracy principles that applicant states would be required to meet before membership would be granted.<sup>127</sup> Precisely the condition

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<sup>125</sup> The first meeting of the Heads of State or Government of the Twelve held in Rome on 27 and 28 October 1990 provided the outlines of a Treaty on EMU and a Treaty on Political Union. On 14 and 15 December 1990, the Rome European Council, attended by the representatives of the governments of the Twelve, officially inaugurated the two conferences, which were tasked with amending the Treaty establishing the European Economic Community (EEC). They were to be held under the Luxembourg Presidency and then under the Dutch Presidency.

<sup>126</sup> Finland, Sweden and Norway.

<sup>127</sup> Having confirmed that the accession of Austria, Finland, Sweden and Norway had to be accomplished by 1 January 1995, the European Council welcomed the adoption by the Commission of its opinions in respect of the membership applications from Cyprus and Malta. It also conveyed a very explicit political message to the countries of Central and Eastern Europe by providing them with the assurance that, in accordance with the Commission communication towards a closer association with the countries of Central and Eastern Europe, associated countries that wished to become full members of the Union would be admitted as soon as they satisfy the requisite political and economic conditions. In this context, the European Council acknowledged the need for a reinforced and extended multilateral dialogue and concentration on matters of common interest as well as the need to accelerate efforts to open up Community markets. Copenhagen European Council, 21-22 June 1993- Conclusion of the Presidency, Bulletin EC-6/1993 p.8.

stated “Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.” The Council also laid down in some detail the process for European Union enlargement which required new members to accept in toto the *acquis communautaire*.

## 2.4 THE PLACE OF HUMAN RIGHTS IN THE CFSP OF THE 1990s

### 2.4.1 JOINT ACTIONS AND COMMON POSITIONS

The spread of liberal democracy at the end of the Cold War and after the submission of numerous applications to the Maastricht Treaty appeared to set the stage for a new international order in which human rights would have played a central role.

The transformation of the Eastern bloc states from modern states insistent on their sovereignty and the importance of peaceful coexistence to post-modern states wishful to accept international supervision of human rights and democracy suggested that the post-modern approach to statehood was spreading beyond Western Europe. Moreover, as the European Commission noted in its Communication on human rights policy for the 1990s, the collapse of the Soviet Union “reduced the importance of the alliance factor which had long determined relations between industrialized and developing countries and made reactions to a given situation a function of geo-political considerations”<sup>128</sup>. The collapse of the centrally planned economies seemed to set the seal on the growing international consensus that free markets, underpinned by human rights and democracy, were essential to economic development. Finally, popular pressure in the developing world for an end to authoritarian government was matched by growing reluctance among European citizens to carry on supporting dictatorial or corrupt foreign regimes. It was thus unsurprising that the Treaty on European Union, which represented the Member States’ response to the international situation arising at the end of the Cold War, placed human rights at the centre of the new Common Foreign and Security Policy (CFSP), which replaced EPC. The latter had been criticized as excessively reactive and declaratory, lacking in proactivity and instruments

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<sup>128</sup> European Commission, Human Rights, Democracy and Development Policy, 25 March 1991 SEC(91)61.

with which to follow up announcements; the CFSP was designed to tackle these weaknesses. Article J.1(2) of the TEU provided that one of the objectives of the CFSP should have been “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”.

The TEU replaced the Member States’ obligation under Article 30(2)(d) Single European Act to avoid actions impairing their effectiveness as a cohesive force in international relations with a more onerous obligation under Article J.1(4) to “support the Union’s external and security policy actively unreservedly in a spirit of loyalty and mutual solidarity”. Two new instruments for CFSP were established; the Common Position and Joint Action. While Article 30(2)(c) SEA had merely provided that common positions should “constitute a point of reference for the policies” of the Member States, under Article J.2 TEU the Member States had to ensure their national policies conform to Common Positions and had to coordinate their action in international organizations and conferences in order to uphold the Common Position. Article J.3 TEU provided that the Council of Ministers may have adopted, on the basis of general guidelines from the European Council,<sup>129</sup> Joint Actions that had to commit the Member States in the positions adopted and in the conduct of their activity. Joint Actions were intended to enable the Member States to display greater cohesion and political authority in their response to major foreign policy issues. The effectiveness of these innovations, however, was undermined as each Member State retained a veto concerning the adoption of Joint Actions and Common Positions.

The introduction of the CFSP made little difference to the number of statements and quotes concerning human rights made by the Member States. The annual Memoranda to Parliament record that the Union published more than 80 declarations concerning human rights in 1994<sup>130</sup>, 69 in 1995<sup>131</sup>, and 40 declarations in 1996<sup>132</sup>. The European Parliament during those years continued to complain and to express concern about the vagueness of the Memoranda.<sup>133</sup> The Memorandum indeed for 1996 was characteristically uninformative. Some countries with serious human rights problems,

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<sup>129</sup> The Lisbon European Council decided among the objectives of joint actions were to be the strengthening of democratic principles and institutions and respect for human and minority rights and the promotion of good government. Bulletin 6/1992, at para. I.31.

<sup>130</sup> CFSP Unit, General Secretariat of the Council, Memorandum of the European Parliament on the activities of the European Union in the field of human rights, DOC 5644/2/94, at para. 19.

<sup>131</sup> CFSP Unit, General Secretariat of the Council, Annual Memorandum to the European Parliament on the activities of the European Union in the field of Human Rights 1995, DOC 5468/96, at 5.

<sup>132</sup> CFSP Unit, General Secretariat of the Council, Annual Memorandum on the activities of the European Union in the field of human rights 1996, DOC 11446/97, at 5.

<sup>133</sup> OJ C 126/1995; OJ C 20/1996.

such as Algeria, Ethiopia, Saudi Arabia and Syria were omitted from the Memorandum altogether. The Memorandum referred to the adoption of political initiatives concerning Afghanistan, Burma, China and Indonesia but revealed nothing about the effectiveness of these initiatives. Many other countries with grave human rights problems, such as Nigeria, Sierra Leone and Sudan, were mentioned only briefly.<sup>134</sup>

A subsequent review of the European Union's human rights policy suggested that an Annual Report on human rights, based on reports from the Commission's overseas delegations, had to be drawn up to ensure that human rights formed a "constant and stable feature of the Union's foreign policy posture".<sup>135</sup> In its Declaration on the 50<sup>th</sup> anniversary of the Universal Declaration of Human Rights in December 1998, the European Council agreed to consider the possible publication of an annual human rights report and the following month the Council invited the Committee of Permanent Representatives (COREPER) to work out the general structure of the report.<sup>136</sup> This seemed to represent a significant commitment by Member States, as it was likely both to generate annual friction with the countries criticized and to draw public attention in Europe to human rights abuses, so stimulating greater public pressure for action.

Since the beginning of the 1990s, the Eastern European states in the OSCE have in general been eager to follow the EU Member States' lead on issues of human rights and democracy, also because they had to embrace the Union's norms in these areas in order to accede to the Union. The member States have continued to participate actively in the OSCE by, for example, presenting joint papers on all agenda items at review meetings and adopting Joint Actions and Common Positions.<sup>137</sup>

The problem of those Joint Actions, within the area of the CFSP, was that they could only be adopted unanimously. Joint Actions, which were intended to allow the Union to

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<sup>134</sup> Van der Klaauw, *European Union: Council Memorandum of EU Activities in the Field of Human Rights during 1996*, NQHR 230, 1998, p.142.

<sup>135</sup> Alston and Weiler, *An "Ever Closer Union" in Need of a Human Rights Policy*, EJIL, 1998.

<sup>136</sup> CFSP Statement 14128/98 10 December 1998; EIS European Report No 2368, 6 March 1999, Section V, at 5.

<sup>137</sup> Joint Actions often consisted of launching or extending an out-of-area civilian or military operation under the Common Security and Defense Policy (CSDP). Some Joint Actions have also included the appointment of EU Special Representatives (EUSRs), senior diplomats assigned to a sensitive country or region in order to give the EU extra political clout. A Joint Action might also provide financial or other support to the activities of an international organization engaged in efforts such as non-proliferation (the International Atomic Energy Agency, for example) or peace building (the Organization for Security and Cooperation in Europe, for example). Common Positions used to reiterate the EU's objectives and define a collectively agreed diplomatic approach to a particular region or country. The EU generally used these types of CFSP Decisions to address a problematic situation, often involving a foreign government that failed to respect principles of human rights, democracy, rule of law, or international law. In addition, rather than dealing with a single country or region, a Common Position might address a cross-cutting topic such as conflict prevention and resolution, arms control, or terrorism.

deal with important foreign policy issues, have in practice been adopted only on uncontroversial issues where the interest of all Member States could have been accommodated and when the country which was the target of the Joint Action was happy with the proposed action.<sup>138</sup> In the field of human rights, Joint Actions have represented a success for the CFSP, as before the TEU Member States had made no attempt to become involved collectively in these actions but had instead contributed to help United Nations in its missions.

#### *2.4.2 THE TRIUMPH OF ECONOMIC INTERESTS IN THE UNION'S RESPONSE TO HUMAN RIGHTS VIOLATIONS IN AFRICA*

The CFSP has had a small success in producing a vigorous Union response to violations of human rights. Following the execution in November 1995 of Ken Saro-Wiwa<sup>139</sup> and eight other members of the Ogoni tribe in Nigeria, the Council adopted two Common Positions imposing a number of minor sanctions: the restriction of the grant of visas to members of Nigerian government and security forces, the imposition of an arms embargo, the expulsion of all military personnel at Nigerian embassies and the withdrawal of the equivalent personnel from Nigeria and the denial of visas to Nigerian sport teams.<sup>140</sup> Although the European Parliament called unanimously for the Council to introduce an oil embargo, the Council, motivated by fears of an increase in oil prices, concerned about European banks' exposure to Nigerian debt and worried about the effect on European companies with substantial investments in the Nigerian oil industry, refused to go beyond these limited sanctions.

During the same years, Belgium and France, the two Member States with the closest ties with Rwanda, enjoyed significant potential leverage in view of the very substantial and increasing levels of economic assistance which they provided. However, although France had declared that its economic aid to Africa was conditional upon the observation of human rights, in practice French policy towards Rwanda was driven not by concern for human rights but by a determination to fight Anglo-Saxon

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<sup>138</sup> N.Winn, *The Proof of the Pudding is in the Eating: The EU Joint Action as an Effective Foreign Policy Instrument?*, International Relations, 1997, p.75.

<sup>139</sup> (1941-1945) He was a Nigerian writer, hanged in 1995 by the military dictatorship of General Sani Abacha. His execution, consequently to his fight against the environmental degradation and the multinational petroleum industries, provoked international outrage and resulted in Nigeria's suspension from the Commonwealth of Nations for over three years.

<sup>140</sup> Decision 95/515/CFSP OJ L 298/1995; Decision 95/544/CFSP OJ L 309/1995.



encroachment, in the shape of Tutsi rebels supported by Uganda, on its traditional sphere of influence in Africa.<sup>141</sup> Neither Belgium nor France reduced development aid in response to increasingly severe human rights violations in Rwanda, sending in this way a clear message to the African government that support would continue regardless of human rights abuses.<sup>142</sup> France moreover continued to supply and service much of the materiel used by the Rwandan army, even after the imposition of the United Nations arms embargo in May 1994. The French determination to pursue its own agenda in the Great Lakes region prevented the European Union from reacting promptly to the genocide in 1994 and limited the Union's response to declarations and belated gestures of concern. The Council was unable to adopt a Common Position until the main period of genocide had finished in October 1994, which belatedly called for the provision of humanitarian aid, the deployment of human rights observers and UN forces and the establishment of an international war crimes tribunal.<sup>143</sup> The Union's failure to act more quickly in this case was especially tragic as, given Rwanda's dependence on economic aid, the Union's influence was huge.<sup>144</sup>

The Union's response to the massacres of refugees in Zaire in late 1996 was much the same as its response to the Rwandan genocide; the Council adopted a Joint Action only after much of the killing was over. Although it was apparent from September 1996 that massacres were occurring among Rwandan refugees<sup>145</sup>, it was not until 22 November 1996 that the Council adopted a Joint Action pledging humanitarian aid for the refugees and support for a multinational force to implement Security Council Resolutions. As the implementation of this decision could have required the use of military force, the Council asked the Western European Union to examine how it could have contributed to implementation; the use of the Western European countries outside Europe to prevent attacks on refugees would have been a remarkable innovation. In the event, once refugees had started to move home in large numbers, the political will to intervene evaporated. Although it was clear that the refugees were being harried viciously during their flight, the Member States were content to let events unfold. The Council subsequently adopted two Joint Actions pledging support for democratic transition in Zaire through the establishment of a European electoral unit and a

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<sup>141</sup> G. Prunier, *The Rwanda Crisis: History of a Genocide 1959-1994*, Hurst Publishers, 1998, pp.104-106.

<sup>142</sup> Joint Evaluation of Emergency Assistance to Rwanda, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience – Historical Perspective*, vol.I, 1996, p.39.

<sup>143</sup> Common Position 94/697/CFSP OJ L 283/1994..

<sup>144</sup> Ibid.

<sup>145</sup> Human Rights Watch/Africa, *Democratic Republic of the Congo – What Kabila is Hiding: Civilian Killings and Impunity in Congo*, 1997.

contribution to the United Nations Special Found. The most difficult human rights issue that faced the Union, however, was weather to resume aid to the government while it continued to obstruct the work of the United Nations investigation into the refugee massacres. Resuming economic aid could have well encouraged stability and economic activity, thereby moving the country towards the establishment of democracy and the rule of law, yet simultaneously implied indifference to the slaughter and a failure to break the culture of impunity central to human rights abuses.

In May 1998, the Council adopted a Common Position which provided that the Union would have supported the ongoing establishment of democracy in Africa by encouraging respect for civil and political social, economic and cultural human rights; respect for basic democratic principles, including the right to choose leaders in free elections, the separation of powers and freedom of expression, association and political organization; the rule of law including a legislative and judicial system giving full effect to human rights and fair, accessible and independent judicial system; and good governance, including the transparent and accountable management of a countries' resources. The Union would have increased support for African countries where positive changes had occurred and consider "appropriate responses" to negative changes. The Common Position thus repeated the stance set out in the human rights, democracy and development Resolution adopted by the Council in 1991<sup>146</sup>, which had since formed the basis for Community development policy.<sup>147</sup> The Common Position was more modest than the 1991 Resolution, which made reductions in military expenditure a condition of further Community aid<sup>148</sup> and which applied to all developing countries. The Common position not only substantially expanded the brief reference to human rights and democracy in Article J.1(2) TEU, but also served as a framework for the actions of the Member States. It is notable that seven years elapsed before the Member States accepted that the principles contained in 1991 Resolution would have governed CFSP policy and their bilateral relations with the African States as well as Community development policy. This showed how the European Union implied lots of efforts and time to learn and finally work as a whole unique organ instead of a set of different parties with different goals.

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<sup>146</sup> Bulletin 11/1991, at para.2.3.1.

<sup>147</sup> T.King, *Human Rights in European Community Development Policy...*, p.112.

<sup>148</sup> In the June 1997 Common Position on conflict prevention and resolution in Africa, the Member States undertook to exercise responsibility concerning arms exports to Africa and to encourage African States to submit annual returns to the UN Register of Conventional Arms. Decision 97/356/CFSP, OJ L 153/1997.

#### 2.4.3 THE ARDUOUS RELATIONS WITH CHINA AND THE ASEAN COUNTRIES

It is the Council policy toward China, which has proved, in the words of Chris Patten<sup>149</sup>, “the most embarrassing indication of the gulf between European rhetoric and reality”.<sup>150</sup> In response to Tiananmen Square massacre, in 1990 the Member States first co-sponsored a resolution before the Human Rights Commission condemning China’s human rights record and subsequently co-sponsored similar resolutions each year. These resolutions represented a notable success for EPC and CFSP, as alone each Member State might have hesitated to sponsor a critical resolution for fear of commercial retaliation from one of Europe’s most important export markets. In 1997, however, France, Germany Italy and Spain withdrew their backing for the resolution<sup>151</sup>; the alteration in French policy, which was seen as crucial, was attributed to French reluctance to upset China shortly before President Chirac paid a state visit to Beijing during which he was to sign an export contract for Airbus.<sup>152</sup> As the Dutch Presidency noted, the French decision put “the essence of the human rights policy of the European Union at stake”.<sup>153</sup> Denmark, with the support of nine Member States, subsequently sponsored the resolution; China retaliated by cancelling a visit by Zhu Rongji, the Vice-Premier, to Denmark and some of its co-sponsors.<sup>154</sup> In February 1998 the Member States put an end to discussion by agreeing not to sponsor Resolutions on China before future sessions of the Human Rights Commission.<sup>155</sup>

In a Communication on relations with China in early 1998, the European Commission argued that resumption of dialogue with China would be more productive than condemnation that China would inevitably rejected; an “EU-China human rights dialogue without any preconditions gives the EU a real opportunity to pursue intense discussions which , coupled with specific cooperation projects, remains at present the most appropriate means of contributing to human rights in China”.<sup>156</sup> Agreeing with the Commission’s analysis, the Member States announced that the Union would support China’s transition to an open society based on the rule of law and human rights by

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<sup>149</sup> European Commissioner for external relations from 1999 to 2004.

<sup>150</sup> C.Patten, *East and West*, London, Pan Books, 1998, p.303.

<sup>151</sup> Ibid. p.304.

<sup>152</sup> *Eu Divided on China Policy*, The Guardian, 5 April 1997, p.15.

<sup>153</sup> The Commission noted that the EU’s human rights policy was “in complete disarray”. Ibid.

<sup>154</sup> *China Punishes EU Small Fry*, The Guardian, 19 April 1997, p.16.

<sup>155</sup> Bulletin 1/2/1998, at para. 1.4.126.

<sup>156</sup> HAEU, AV-82, European Commission Communication, Object: Building a Comprehensive Partnership with China, 25 March 1998.

funding a number of projects, including a programme of human rights training and exchange visits for Chinese lawyers, judges, civil servants and village governors, a legal aid programme to improve access to justice by the population and a joint seminar in Beijing to study human rights and the administration of justice. In early 1998, the British Presidency drew attention to China's agreements to sign the UN Covenant on Civil and Political Rights, the release of several well-known dissidents and cooperation for the first time with UN human rights mechanism as evidence that the new policy produced change for the better.<sup>157</sup> The European Parliament remained skeptical, calling on the Member States to co-sponsor a Resolution on China before future sessions of Human Rights Commission and calling on the Presidency to submit regular reports on the Union's activities concerning human rights in China, an invitation which the Council has shown no sign of accepting. Moreover, in hearings before the European Parliament, the prominent dissident Wei Jingsheng criticized the new policy as a "big step backwards" which had disheartened human rights activists in China; in his view, only strong external pressure would produce change.<sup>158</sup> Further doubt was thrown on the effectiveness of the Union's policy of dialogue in autumn 1998, when the earlier loosening of restrictions on political debate suddenly ended, with the detention of numerous political activists, the banning of several political organizations and the closure of certain newspapers.<sup>159</sup> Instead of protesting at the imposition of long prison sentences on three leading dissidents, in December 1998, the Member States didn't respond in public to the new wave of authoritarian measures. China in the years later represented an especially delicate test of the Union's commitment to human rights; while it could have become impossible to hold human rights dialogue with a government which was firmly suppressing political dissident, the Member States has been likely to be most reluctant to resume annual confrontation with China over human rights.

Differently from what happened in the African continent, the continuing economic success of the East Asian states seemed to demonstrate that authoritarian government could, when combined with certain cultural factors, produce dynamic growth. During the 1993 Vienna World Conference on Human Rights and subsequently, these states reiterated their commitment to the principle of non-intervention and castigated European attempts to raise human rights issues as an irrelevance given the evident

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<sup>157</sup> Foreign and Commonwealth Office, Annual Report on Human Rights 1998, p.40.

<sup>158</sup> EIS European Report No. 2327, 22 June 1998.

<sup>159</sup> US Department of State, Country Reports on Human Rights Practices for 1998 – China, 26 February 1999.

success of “Asian values” in reducing poverty and promoting development.<sup>160</sup> At the same time, the more global market arising after the end of the Cold War greatly stimulated international economic competition. Faced with economic recession, the Member States were extremely keen to increase exports to the Asian “tiger economies”, a goal which was unlikely to be realized if relations were poisoned by wrangling over human rights. Relations with ASEAN have thus provided the hardest test of the Member States’ commitment to human rights as, despite the Member States’ eagerness to improve trade with the region, it is impossible to ignore the flagrant abuses in Burma and East Timor. Portugal accession to the Community in 1986 first put East Timor on the EPC agenda, even though other Member States, especially Germany and the United Kingdom, were reluctant to draw attention to this issue; between 1975 and 1982 the Twelve, with the exception of Greece and Ireland, had abstained on all UN General Assembly votes concerning East Timor.<sup>161</sup> After 1986, East Timor began to feature in EPC declarations on human rights, but it was not until the 1991 Dili massacre<sup>162</sup> that EPC condemned Indonesian behavior in East Timor. However, British, Dutch and German pressure ensured that the texts were milder than Portugal had demanded; while criticizing the armed forces, the statements largely accepted the findings of the Indonesian commission of inquiry. In July 1992, the Council discussed negotiating a new cooperation agreement with ASEAN to replace the existing 1980 agreement between the Community and those countries, but Portugal vetoed the start of negotiations because of its concern over East Timor. In an effort to persuade Portugal to withdraw its veto, in June 1996 the Council adopted a Common Position on East Timor, which expressed support for the talks taking place under the control of the UN Secretary-General and called upon the Indonesian government to adopt effective measures leading to a significant improvement in the human rights situation in East Timor.<sup>163</sup> Even such muted criticism drew a sharp reaction, with the Indonesian Foreign Minister denouncing the Common Position as “tantamount to a

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<sup>160</sup> J.T.H. Tang, *Human Rights and International Relations in the Asia-Pacific Region*, 1995.

<sup>161</sup> De Vasconcelos, Portugal: Pressing for an Open Europe, in C.Hill, *The Actors in Europe’s Foreign Policy*, 1996.

<sup>162</sup> The Santa Cruz massacre (also known as the Dili massacre) was the shooting of at least 250 East Timorese pro-independence demonstrators in the Santa Cruz cemetery in the capital, Dili, on 12 November 1991, during the Indonesian occupation of East Timor.

<sup>163</sup> Common Position 96/407/CFSP, OJ L 168/1996.

declaration of war”,<sup>164</sup> and led ASEAN to consider whether the Union should continue to participate in the ASEAN Regional Forum.<sup>165</sup>

Asian foreign ministers made clear before the first Asia-Europe summit meeting (ASEM) in March 1996 that “sensitive, controversial and irrelevant issues” had to be avoided and the Indonesian Foreign Minister sought to extract a guarantee that the issue of East Timor would not be raised.<sup>166</sup> Although human rights issues were discussed in bilateral meetings between heads of government at the summit, the Chairman’s Statement noted blandly that while the parties affirmed their strong commitment to the Universal Declaration of Human Rights, political dialogue between the two regions would take place in conformity with the norm of non-intervention in the internal affairs of the partners.

In 1996, Denmark pressed for the symbolic sanctions already implemented against Burma by EPC to be strengthened. The Union’s response was minimal; in October 1996, the Council adopted a Common Position which condemned continuing human rights abuses in Burma, confirmed the existing sanctions, introduced a ban on entry visas for senior members of the SLORC<sup>167</sup> and the military and suspended high-level bilateral government contacts with Burma.<sup>168</sup> Despite this condemnation of the SLORC, several Member States continued vigorously to promote trade with Burma.<sup>169</sup> The Union’s reaction to the admission of Burma to ASEAN in July 1997 was muted; the Council made no criticism of the decision, although it did note that human rights situation in Burma precluded Burma’s accession to the EC-ASEAN Cooperation Agreement. The Member States have subsequently encountered some difficulty in maintaining their dialogue with ASEAN while refusing to deal with Burma. A specialist ASEAN-EU cooperation conference in November 1997 was postponed because the Union refused to attend if Burma was allowed to participate.<sup>170</sup> The Union also refused to invite Burma to the second ASEM summit in April 1998, arguing that membership of

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<sup>164</sup> *Spring to Raise EU Concerns on Rights and East Timor*, Irish Times, 22 July 1996, p.8.

<sup>165</sup> Reuters European Community Report, *Europe-Asia Courtship Strained over Human Rights*, 22 July 1996.

<sup>166</sup> Serradell, *The Asia-Europe Meeting (ASEM): A Historical Turning point in Relations Between the Two Regions*, European Foreign Review, 1996, p.200.

<sup>167</sup> The military government of Burma SPDC (in extenso State Peace and Development Council), in the period 1988-1997 was known as SLORC ( State Law and Order Restoration Council).

<sup>168</sup> Common Position 96/635/CFSP OJ L 287/1996.

<sup>169</sup> Pilger, *The Betrayal of Burma*, The World Today, 1996. The European Commission demonstrated its determination to protect European trading interests in Burma when in June 1997 it submitted a complaint to the World Trade Organization concerning a Massachusetts state law which barred the state government from entering into contracts with American or foreign companies doing business in Burma. WTO complaint number WT/DS88/1.

<sup>170</sup> *Myanmar’s Seat at the Back*, The Economist, 15 November 1997, p.69.

ASEAN did not automatically entitle a state to participate in ASEM.<sup>171</sup> Although this decision drew sharp criticism from Malaysia it did not make good its threat to boycott the meeting. The quid pro quo for accepting Burma's exclusion appeared to be the complete exclusion of human rights issues from the summit itself. The Union's desire to avoid conflicts with ASEAN countries was strong and it was further demonstrated by the British Presidency's vigorous lobbying at the 1998 UN Human Rights Commission against the adoption of a strong resolution on East Timor.

## 2.5 THE LIMITATIONS OF THE UNION'S HUMAN RIGHTS POLICY TOWARDS THIRD COUNTRIES

As the paragraphs above show that, the Union's human rights approach with other countries has in general remained limited to issuing condemnatory declarations for the entire time of the 1990s. This "declaratory strategy" on human rights was not futile, as the Union's repeated denunciations of violations have helped to make clear that human rights abuses were no longer acceptable to the community. In the mid 1990s although post-modern states accepted that the protection of human rights was in the long term fundamental to international order and stability, in the short term states were often reluctant to raise human rights issues for fear of disrupting good diplomatic relations. Collective action through the CFSP however had a positive effect which could reduce the costs traditionally associated with human rights diplomacy.<sup>172</sup> As the European Union used to gain authority as a political actor on the world stage, third states started to be increasingly keen to maintain a friendly dialogue with the Union and anxious to avoid economic sanctions, which were far more punitive weapon when imposed by the Community rather than by a single member State. Moreover, any state contemplating retaliation in response to criticism of its human rights record was evidently far less likely to retail against the Union than against a single member State. Nevertheless, not all member States have been persuaded that the costs of human rights diplomacy adopted by the Union was reduced to an acceptable level. The different assessments by Member States, in fact lead to not only a huge battle based on budget lines in the

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<sup>171</sup> Morten B. Pedersen, *Promoting Human Rights in Burma*, Rowman & Littlefield Publishers, INC, USA, 2008, pp. 36-37.

<sup>172</sup> Fouwels, *The European Union's Common Foreign and Security Policy and Human Rights*, NQHR, 1997.

subsequent years, but also to a different assessment of the importance of human rights issues. While unanimity was required to adopt Joint Actions and Common Positions, any Member State, concerned that action might endanger its economic or political interests, could have blocked actions and the Union's human rights policy would have moved slower. Fearful that the national interests entrenched in the Council may give effective response to human rights issues, the European Parliament called for the Intergovernmental Conference to increase its powers over the CFSP by requiring the Council to act on a resolution adopted by Parliament by a two-thirds majority in the field of human rights and democracy.<sup>173</sup> Permitting the Parliamentary control of the Union Foreign Security Policy in any field, let alone the sensitive area of human rights, was unacceptable to most Member States and it was not surprising that this suggestion did not find its way into the Treaty of Amsterdam.

## 2.6 ON THE ROAD TO THE TREATY OF AMSTERDAM

The Treaty on the European Union, signed in Maastricht in February 1992, provided for amendments to be made, in the light of experience acquired, to those provisions which were felt to be inadequate during the negotiations. Article N in the Final Provisions laid down that any Member State, or the European Commission, might submit proposals for the amendment of the Treaties to the Council. The latter, after consulting the European Parliament, and, where appropriate, the Commission, could deliver an opinion in favor of calling an Intergovernmental Conference (IGC), to be convened by the Presidency. A "review clause" in Article N provided for the calling of such a conference in 1996.

In hindsight, the drafters of the Maastricht Treaty on European Union were too optimistic in setting the date of 1996 for the next IGC. The ratification of the TEU proved far more arduous and took much longer than expected, and between 1993-1995 the attention of the Community institutions and the Member States was concentrated upon the negotiations for the accession of Austria, Finland, and Sweden and upon the preparatory steps in the creation of Economic and Monetary Union. The modifications eventually agreed upon in the Treaty of Amsterdam might have been

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<sup>173</sup> T.King, *Human Rights in European Foreign Policy: Success or Failure for Post-Modern Diplomacy?*, European Journal of International Law, 1999, p.173.



more far-reaching had the Intergovernmental Conference been held a year or two later.<sup>174</sup>

In any event, the European Council and the institutions were determined that the IGC should be well prepared. The European Council created a Reflection Group<sup>175</sup> in June 1995, consisting of two senior representatives from each Member State, chaired by Ambassador Carlos Westerdorp of Spain. In an extraordinary step, the European Council invited two representatives of the Parliament to participate in the Reflection Group's work, an invitation that Parliament eagerly accepted in an effort to influence the Reflection Group toward greater amenability to further democratization of the institutions. Each of the Community institutions, including for the first time the Court of Justice, was also requested to provide a report with observations on the functioning of the institutions and possible further Treaty changes.

The Reflection Group provided its report, *A Strategy for Europe*,<sup>176</sup> to the Madrid European Council in December 1995, which made considerable use of it in setting the initial agenda for the 1996 IGC.<sup>177</sup>

The Turin European Council on March 29, 1996,<sup>178</sup> set the formal agenda for the IGC, laying stress upon the preparations for the future enlargement to include Central European states, bringing the Union closer to its citizens, notably by restructuring the Cooperation in Home and Justice Affairs, making the institutions more democratic, efficient, and transparent, especially by widening the scope of co-decision and examining the modes of Council voting, and strengthening the external relations capacity of the Union, especially by improved procedures and structure in the Common Foreign and Security Policy. The Intergovernmental Conference (commonly designated as the "Turin IGC") presented a draft treaty to the Amsterdam European Council in June 1997, thus working for slightly more than a year. The Commission, under the leadership of President Jacques Santer and Commissioner Marcelino Oreja, was very much involved in the IGC debates and in its drafting process. The Parliament followed

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<sup>174</sup> J. Monar, W. Wessels, *The European Union after the Treaty of Amsterdam*, Continuum London and New York, 2001.

<sup>175</sup> Cannes European Council, Conclusions on the Presidency, E.U. BULL., no. 6, at 16 (1995).

<sup>176</sup> E.U. BULL., no. 12, at 9 (1995).

<sup>177</sup> The Madrid European Council also took several key decisions on the timetable for progress toward Economic and Monetary Union and the creation of the euro as a single currency in 2002, and deliberately omitted the EMU provisions of the Treaty from review in the 1996 IGC. See Roger. J. Goebel, *The Treaty of Amsterdam in Historical Perspective: Introduction to the Symposium*. Fordham International Law Journal, Vol.22, 1998, p.25.

<sup>178</sup> Turin European Council, Conclusions of the Presidency, E.U. BULL., no. 3, at 9 (1996).

closely the evolution of the debates and drafting, providing its views regularly. Although the Court of Justice remained apart, its 1995 report undoubtedly weighed heavily in any IGC consideration of the Court's role and jurisdiction.

The Amsterdam European Council of June 16-17, 1997, resolved some outstanding issues, usually through the mode of complex Protocols, and, after some sprucing up over the summer, the Treaty of Amsterdam was signed on October 2, 1997.

From a general perspective it could be said that the Treaty has been a huge success if compared with to the various positions of the member states in 1995, but compared to the institutional agenda , it has been largely a failure.<sup>179</sup> In terms of institutional structure and operations, undoubtedly the most important achievement of the Treaty of Amsterdam has been the modification of the co-decision procedure to put the Parliament on a par with the Council and to add new legislative fields to those in which the co-decision procedure was used. With regard to the scope of action of the European Community, some expansion and increased emphasis has been given in the fields of the environment, health, consumer protection and culture. In addition, a major development has been the gradual transfer of the sectors of visas, asylum rights, immigration, and controls on external frontiers to the Community from the prior intergovernmental procedures in the third pillar, Cooperation in justice and Home Affairs.

As far as concern human rights and fundamental freedoms, efforts by the European Parliament, to include in the Treaty a catalogue of rights, remained mostly unsuccessful. However, the commitment to the principles of liberty and democracy, the respect for human rights and fundamental freedoms, and the rule of law, already expressed after Maastricht in paragraph 3 of the TEU Preamble, were maintained. This commitment was extended to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers<sup>180</sup>, and to other fundamental values common to European citizens.

During the drafting years, there was no doubt that the Union legal order should guarantee an adequate protection of fundamental human rights, which has become the core of Europe's democratic society. Indeed, Amsterdam, while maintaining the

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<sup>179</sup> J.Monar and W.Wessels, *The European Union after the Treaty of Amsterdam*, Continuum London and New York, 2001, p.46.

<sup>180</sup> Paragraph 4 of the TEU preamble.

Maastricht's principles intact, placed a greater emphasis on rights protection, notably through the insertion of a new Article F.1 of the TEU that enabled the Council, acting in its composition of Heads of State or Government, to assess penalties on Member States that violate the principles of democracy, rule of law, and basic rights. Moreover, the Amsterdam Treaty expanded the jurisdiction of the Court of Justice in Article L of the TEU to cover claims that Community institutions have violated fundamental rights. Also potentially of high importance has been the new Article 6 of the EC Treaty, which empowered the Council to adopt measures to "combat discrimination based on sex, social or ethnic origin, religion or belief, disability, age or sexual orientation." Specifically, article F (renumbered article 6) of the Maastricht Treaty that contained a reference to fundamental rights in its second paragraph, remained unchanged in the Amsterdam Treaty<sup>181</sup>. Instead, the first paragraph of the same article, was amended in the new Treaty as follows:

*"The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".*<sup>182</sup>

Thus, as specified in an amended Article 49 TEU (formerly Article 0), States wishing to join the European Union had to respect these principles. These changes have been a natural follow-up to the political criteria for membership of the Union set by the European Council meeting in Copenhagen in 1993. The new Article 6 TEU reflected the Copenhagen criteria, with the exception that the protection of minorities was omitted and an extra reference to liberty was included. Through these paragraphs the Treaty reaffirmed the fundamental principles on which the Union was founded and strengthened the Union's commitment to fundamental rights. Moreover, the new Article 7 TEU enabled the Council to take action in the event of serious and persistent breaches of fundamental rights occurring in any Member State.<sup>183</sup> This article has been even more significant, due to its content, according to which *"any Member State*

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<sup>181</sup> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community law."

<sup>182</sup> Previously the first paragraph only stated: "The Union shall respect the national identities of the Member States, whose system of government are founded on the principle of democracy."

<sup>183</sup> "Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligation of the Member State in question under this Treaty shall in any case continue to be binding on that State".

*violating human rights in a serious and persistent way might have some of its rights deriving from the Treaty suspended, in accordance with the procedure laid down in the Article.”* However, Article 7 contained some procedural barriers that made it (politically) difficult for the Council to determine the existence of a serious and persistent breach of the principles mentioned in Article 6. Indeed, according to the procedure, a proposal had to be submitted by one third of the Member States or by the Commission, but it would have been of course unlikely that Member States wanted to accuse each other of breaches of human rights. Furthermore, the Member States behind the proposal needed to find the support of one-third of the Member States to be able to submit it to the Council. In effect, this might mean that most proposals for the Council to determine a breach of fundamental or human rights would have come from the Commission.



## CHAPTER III

### TOWARD THE NEW MILLENNIUM: THE EUROPEAN INSTRUMENTS TO PROMOTE HUMAN RIGHTS

#### 3.1 THE BUDGET LINES' BATTLE: CHAPTER B7-70

The beginning of the 1990s witnessed the creation of several budget lines, created at the behest of the Parliament and managed by the Commission, aimed at promoting human rights.<sup>184</sup> A substantial amount of funds had thus to be devoted to the promotion of human rights, generally via NGOs.<sup>185</sup> In 1992, the Commission published its first annual report “*on the application of the Council resolution on human rights, democracy and development of November 1991*” enumerating the various projects which had been undertaken. According to the report, the Commission had, in the previous years, spent around 12 million ECU in the promotion of human rights, and in addition, supplementary credits had been devoted in the framework of the Lomé Conventions.<sup>186</sup>

From 1992 onwards, Commission reports started to be produced regularly on an annual basis. These reports used to provide an overview of the projects undertaken to promote human rights. Importantly, each year the budget increased and sometimes doubled. In 1993, the annual budget increased from 12 million ECU to reach an annual

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<sup>184</sup> However it seems that the first budget heading devoted to promote human rights was introduced in 1978, with an allocation of 200.000 Ecu. Other headings were added in the subsequent years. See Daniela Napoli, “*The European Union’s Foreign Policy and Human Rights*” in *The European Union and Human Rights* in Nanette A. Neuwahl and Allan Rosas (eds.) Martinus Nijhoff Publishers, 1995, p.305.

<sup>185</sup> However, in some cases, especially in the recent years, the Commission has awarded some funds to intergovernmental organizations, such as the OSCE and the Council of Europe. See European Initiative for Democracy and Human Rights, Compendium 2000.

<sup>186</sup> HAEU, AV-63, Communication de la Commission au Conseil et au Parlement Européen “*rapport sur la mise en oeuvre de la resolution du Conseil et de ses Etats Membres reunis au sein du Conseil sur les droits de l’homme, la democratie et les developpement du 28 novembre 1991*”, Bruxelles le 21 octobre 1992.

amount of 39 million ECU.<sup>187</sup> By 1994, the budget increased to 59 million ECU<sup>188</sup>, and in a few years the annual expenditure reached 100 million EUR.

In the 1994 budget, at the Parliament's request, all headings relating to the promotion of human rights and democratic principles were brought together in a single chapter: Chapter B7-7, entitled "European Initiatives in support of Democracy and the protection of Human Rights"(EIDHR).<sup>189</sup> However, this formal arrangement did not solve the question of economic and social rights, which had to be dealt with under other budget lines<sup>190</sup>, and failed to establish clear priorities, and thus strategies to attain these priorities. Besides, one of the most critical points was the question of its legal basis that was not entirely clear.

Despite the above mentioned issues, that took much work and time of the Commission, the new lines designed demonstrated how the importance of democracy for the EU was not just limited to declarations. This is why the EU created several policy instruments to try to promote democracy, including positive and negative conditionality, democracy aid, political dialogue and election observation.

Democracy has been a condition for membership since 1978, when the European Council declared that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership in the

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<sup>187</sup> Rapport de la Commission au Conseil et au Parlement Européen "sur la mise en 1993 de la résolution du Conseil et des Etats membres réunis au sein du Conseil sur les droits de l'homme, la démocratie et le développement" in COM (94) 42 final, Bruxelles 23.02.1994. It is also significant to point out that the Commission mandated an evaluation of its positive measures in favour of human rights and democracy from 1991 to 1993. See Wolfgang Heinz, Hildegard Lingnau and Peter Waller, *Evaluation des Mesures Positives de la CE en Faveur des Droits de l'Homme et la Démocratie (1991-1993)*, Institut Allemand de Développement (IAD), Berlin, 1995.

<sup>188</sup> Anexo 1 del informe de la Comisión "sobre la aplicación de las acciones de fomento de los derechos humanos y de la democratización (para el año 1995)" COM (96) 672 final, Bruselas 17.01.1997.

<sup>189</sup> The European Community has developed a comprehensive set of measures for responding to different aspects of human rights and democracy. The breakdown of these measures are along thematic and geographical lines:

B7-700 Support for democracy for countries of Central and Eastern Europe and in the Republics formerly part of Yugoslavia

B7-701 Support for democracy in the independent states of the former Soviet Union and Mongolia.

B7-7020 Human rights and democracy in developing countries, especially ACP countries

B7-7021 Human Rights and democracy in the countries of Southern Africa

B7-7022 Special programme for democracy and good governance in Nigeria

B7-703 Democratisation process in Latin America

B7-704 Subsidies for certain activities of organizations pursuing human rights objectives

B7-705 MEDA Programme for Democracy and Human Rights

B7-706 Support for the activities of International Criminal Tribunals and to the setting-up of a permanent International Criminal Court

B7-707 Human rights in Asian countries

B7-709 Support for, and supervision of, electoral processes

<sup>190</sup> B. Simma, Jo Beatrix Aschenbrenner and Constanze Schulte, *Human Rights in Development Cooperation, The EU and Human Rights*, Oxford University Press, 1999, p.605.

European Communities.” The 1993 Copenhagen conditions for EU membership stated that applicants must have achieved “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities”. Third countries beyond Europe were also subject to conditionality. The ‘human rights clause, as already explained in a previous paragraph, defined respect for human rights and democratic principles as an essential provision in the EU’s cooperation and association agreements with all third countries. And new democracies – such as South Africa in 1994 – received promises of aid and agreements so as to encourage and consolidate democratic reforms.

From 1986 the Community began to give small amounts of aid to some third countries specifically to foster democratic reforms. By putting high-level policy statements into practice through incorporating them into regional aid, they created geographically based cooperation programmes, each with a distinct legal, financial and administrative framework. An innovation in terms of logic of action and instruments was the “European Initiative for Democracy and Human Rights” launched in 1994 by the European Parliament.<sup>191</sup> The new framework that merged into the “European Instrument for Democracy and Humans Rights” (EIDHR) in 2006 will group together the budget headings for the promotion of human rights, democratisation, and conflict prevention across countries, also allowing cooperation with non-state actors in third countries.

All of the EU’s political dialogues with third countries and regional groupings were supposed to cover issues relating to human rights and democratisation. Finally, since the early 1990s, the EU has launched numerous missions, under the EIDHR programme, to observe elections in third countries to help ensure that they were conducted freely and fairly.<sup>192</sup>

On the other hand, despite the initial good intentions, there have been reasons to doubt the extent to which democracy promotion really mattered for the EU. As the 1990s demonstrated, the issue of granting funds and the ways in which to direct those funds has been one of the most debated questions by the Council and Commission, often without arising the best outcome for the affirmation of democracy and human rights.

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<sup>191</sup> HAEU, AV-63, Information Note, Background of EIDHR, Brussels 8 October 1998, p.2.

<sup>192</sup> Ibid. p.4.



As already mentioned, the EIDHR represented a small percentage of the EU's external action budget, and during the 1997-1998 the Directorate General for External Relations worked to keep the Initiative alive and to obtain enough funds to promote its basic principles. EIDHR funds have not been used extensively in regions of the world that were more sensitive to outside 'interference' on issues of domestic jurisdiction. Most of the EU's external aid used to go to traditional development activities and reconstruction, and there's always been a strong tendency to assume that political change would have followed naturally from economic reform.

The EU's political dialogues with third countries have always been short meetings with long agendas that included numerous topics in addition to human rights and democracy concerns, but rarely there have been dialogues on human rights alone.<sup>193</sup> These inconsistencies did not fit very well with the EU's declared foreign policy ambitions, hard choices have to be made about priorities, especially in the short term, and human rights were rarely one of them. Along with it, while democracy promotion has been clearly an important foreign policy aim for the EU, and resources has always been devoted to it, not by any means it have come top of the EU's hierarchy of interests. This hierarchy has had its consequences in the struggle to promote EIDHR and other programmes that will be analysed in the next paragraphs.

In 1997 for instance, the Commission tried to address the last point, that is, the legal basis and presented a proposal of Council regulation entitled "*on the development an consolidation of democracy and the rule of law and respect of human rights*". However, the Council Legal Service did not share the view of the Commission and affirmed "in any case no measure in this area could be directed towards actions promoting the observance of human rights and democratic principles by and in the Member States"<sup>194</sup>.

Among the elements of crisis that driven the Commission to a breaking point in 1998, there has been the problem of the European Human Rights Foundation, and the missed renewal of the Commission contract with it after May 1998.

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<sup>193</sup> HAEU, AV-65, Memo providing terms of reference for technical and administrative assistance for the European initiative for democracy and human rights, s.f., 30 September 1998.

<sup>194</sup> Weiler and Fries, *A Human Rights Policy for the European Community and the Union: the Question of Competences*, The European Union and Human Rights, Oxford University Press, 1999.

### 3.2 THE EHRF AND ITS CONTRACT WITH THE EUROPEAN COMMISSION

In 1976 the European Parliament voted 200.000 ECU for the benefit of “activities of non-governmental organizations pursuing humanitarian objectives and concerned with the defence of human rights. However, one of the principal non-governmental organization, Amnesty International, did not take up the funds because of a perception that it would have put at risk its independence and fall under the control of a public authority. Confronted with this situation, the European Parliament and Commission approached NGOs to assist with the setting up of a body that would intervene between the Community Institutions and the intended recipients of Community budget funds. This had the merit to ensure that the project selection procedure would have been free from meddlesome parliamentary lobbying, undertaken by personnel equipped with the necessary skills and experience, and the whole managed by a neutral body in the competitive world of NGOs.<sup>195</sup> However, the initiative proved unattractive to NGOs, until the then Secretary General of Amnesty International, Martin Ennals, offered to resign his position and, on condition that the Commission met expenses, established what became the European Human Rights Foundation. The inaugural meeting of the EHRF was held on 19 December 1980.

Initially, the Foundation secretariat was based in London and comprised Mr. Peter Ashman<sup>196</sup> as Director. The legal seat of the Foundation was established in the Netherlands as this location was considered to offer the most favourable fiscal and legal conditions. During its first 11 years of existence, the work of the Foundation comprised the distribution of small grants from its found: the European Human Rights Found.<sup>197</sup>

In 1992 the Commission founded the move of certain operations of the Foundation from London to Brussels. The object was to facilitate frequent contact with the Community institutions, in fact Mr. Ashman was able to assist the Secretariat General with its work on human rights projects.

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<sup>195</sup> HAEU, AV-63, Briefing for Commissioner Van den Broek, Foreign Affairs Committee 30.09.1998

<sup>196</sup> Mr. Ashman was approached by Mr. Ennals. See HAEU, AV-65, Relation on the European Human Rights Foundation, EU Commission for External Relations, 30.09.1998.

<sup>197</sup> Ibid.

During the same period, there was a pilot call for macro project proposals under PHARE<sup>198</sup>. The Commission and Parliament perceived this initial experience as a success and so agreed to move beyond the pilot phase. A contract was signed with the Foundation in January 1994 to administer the macro project programme for PHARE. The Foundation then established its main office in Brussels, while maintaining also the London seat, as was the legal one in Netherlands. In the same year offices in Prague and Warsaw were opened, and by 1995 the Foundation had an additional office in Brussels dedicated to the DG IA.<sup>199</sup>

From 1989 until January 1997, there was a creditable development of the response of the Commission pressure from public opinion and from the European Parliament that there was the need to be active in various geographical areas, and in different issues related to democratization and human rights. The Commission sought and found outside skills to compensate for its relative inexperience in this field by retaining the services of the European Human Rights Foundation.<sup>200</sup> As a non-profit making foundation established precisely for the sort of work which it then has done for the Commission, there has never been a time tendering found appropriate. Contracts have always been concluded following direct negotiations. The work for the EHRF comprised the technical appraisal of projects applications, the on-going monitoring of projects, assessments of interim and final reports, and advice to potential and unsuccessful applicants. According to the Commission, it was precisely the specialist nature of this work, and the accumulated experience of the EHRF, which made these tasks inappropriate to contract by competition and contributed to the last attempt at tendering being unsuccessful.<sup>201</sup> The Commission retained also that the organization of a

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<sup>198</sup> Phare and Democracy Programme was a financial instrument of the European Union (EU) for cooperation with Central and Eastern European countries to support their transition to market oriented economy and their accession to EU.

<sup>199</sup> During the period covered by the audit, the management of the human rights and democracy programmes was spread across several departments of the Commission. A department in DG I. A was responsible for the programmes in central and eastern Europe and the new independent States and provided overall coordination through an interdepartmental group. DG VIII had a unit responsible for these measures in the ACP States, and, for most of the period covered, was also responsible for human rights and democracy measures in Asia. DG I. B managed the programmes for Latin America and the Mediterranean, and in 1998 took over from DG VIII responsibility for the human rights and democracy measures in Asia. As part of the reorganization of the Commission departments in 1999, a part of DG I. A and DG I. B became part of DG external relations and DG VIII became DG Development.

See Eur-Lex, Access to the European Union law: [http://eur-lex.europa.eu/legal\\_content/EN/TXT/?uri=CELEX%3A32000Y0810\(01\)](http://eur-lex.europa.eu/legal_content/EN/TXT/?uri=CELEX%3A32000Y0810(01))

<sup>200</sup> HAEU, AV-65, Document: Reform of Democratization and Human Rights Programme Management. The Need for Interim Continued Support from EHRF.

<sup>201</sup> HAEU, AV-63, Letter from Tom Spencer (Committee of Foreign Affairs, Security and Defence Policy) to Mr José Maria Gil-Robles, President of the European Parliament, Bruxelles 5 May 1998.

programme of multiple and heterogeneous activities could only be carried out effectively by the Commission, given its limited human resources, by resources to outside support. Over the life of the Phare and Tacis Democracy Programme the EHRF has provided such support<sup>202</sup>. Thus the management of the human rights budget lines was fully within the Commission, but the EHRF provided a team of experts to vet proposals, analyze reports and support thematic work.<sup>203</sup>

If formally the Foundation has been contracted by DGIA to provide technical assistance for specific actions within fixed deadlines with payment dependent on the submission of reports or invoices, in practice this used to involve the Foundation in the staffing and equipping of two principal offices in Brussels: one for the management of macro projects (which was the main action of the Human Rights and Democracy Initiative), and then the Found and the performance of the continuing functions of an office dedicated to DGIA.

From its inception until 1992, the core work of the Foundation has been to distribute grants to a maximum of 10.000 ECU to human rights NGOs small projects with the minimum of ex-ante and ex-post scrutiny. This way of working was dictated largely by the limited Community funding that did not found many large projects.<sup>204</sup>

In June 1992 the role of the Foundation as an agency for the processing, evaluation and monitoring of applications for grant aid and the payment of small grants, was substantially modified to embrace the provision of direct assistance to the Commission by Mr. Ashman, secretary in the evaluation and selection of applications for the funding of human rights macro projects. It was thus agreed to place this working relationship on a contractual basis. However, a delay in signing the initial contract meant that there were no calls for proposals to NGOs in 1993. Accordingly, the 1993 budget appropriations funded the projects selected from the first call for proposals in 1994, and 1994 budget appropriations funded the projects funded from the second call for proposals in October of the same year.<sup>205</sup>

The launch of the Democracy Programme by the Commission following an initiative of the European Parliament, was marked by the circulation of guidelines to known NGOs

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<sup>202</sup> HAEU, AV-65, Angel Viñas speech, s.d.

<sup>203</sup> HAEU, AV-65, Urgent Note for the attention of Mr Burghardt, Director-General, Subject: Continuity of Human Rights and Democratisation Programme Support: the European Human Rights Foundation., Brussels, 25 June 1997, D(97)18702.

<sup>204</sup> HAE, AV-65, Note de dossier, Angel Viñas, Bruxelles, le 3 mars 1997.

<sup>205</sup> HAEU, AV-81, Annex 3 of the "Written procedure for the contracting of the European Human Rights Foundation", Brussels, 31 July 1998.

in PHARE countries in August 1992. By November of the same year 350 proposals were received. By April 1993, 52 projects had been selected by DG IA with help from the Foundation who was contracted as an external consultant. The large number of proposal received, as the decision to extent the programme to TACIS countries from 1993, persuaded the Commission to let a contract in 1994 with the Foundation for the management of the macro projects scheme.<sup>206</sup> In those years, the EHRF was also given an annual subvention to provide “*prestations de services*” to Commission staff managing the budget lines under B7-7. This involved EHRF staff working on administrative aspects of the projects – checking for compliance with criteria, assisting with evaluation, negotiating budgets, preparing papers for inter-service groups meetings, preparing contracts and letters of notification of results, drafting reports, and checking narrative and financial reports sent in by projects operators. Among its competences there was no delegation of Commission powers, and the arrangement ceased at the end of May 1998.

### 3.3 THE NEW ARRANGEMENTS FOR 1998

Given that the European Human Rights Foundation was not a Community institution, it was decided in 1997 that the contracting of the Foundation by direct agreement was no longer appropriate after so many years have passed with such a regime, and that a competitive tendering process should be conducted to select a successor organization.<sup>207</sup> Reorganization within DG IA of the Commission had resulted in the regrouping of both general human rights support and the Phare and Tacis Democracy Programmes under one unit. It was therefore decided in 1997 that there should be a call for proposals for the regrouped services needed in the field of human rights and democratization.

In January 1998, an open invitation for pre-qualification was published in the Official Journal and on Internet to identify contractors potentially interested to supply expertise and technical assistance as described in a summary of the terms of reference. In the

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<sup>206</sup> The programme units in PHARE and TACIS functioned as programme coordinators until 1996 when they were amalgamated into a new PTDP Programme Unit. See HAEU, AV-65, The management of macro projects, EHRF, 30/09/1998.

<sup>207</sup> HAEU, AV-81, File Note, subject: Plenary Session of the European Parliament. Statement by Mr. Van den Broek on Human Rights and Democratization budget management of 17th November 1998. , Brussels 18.11.1998.

selection of interested contractors there were no reasons to exclude the proposal of the Foundation, which for its services had been appreciated by the Commission, and of which, the European Court of Auditors in a sector letter, had confirmed the integrity and quality.

A restricted tender was subsequently launched on 15 March 1998 with deadline of 6 May 1998. The subsequent identification of the offer, which was technically and economically the most advantageous, was done without regard to the services provided by organizations in the past. It was thus that the proposal of the EHRF was recommended to the Commission to be the basis of a contract on the strength of its tender proposal alone.

Being the assistance of the EHRF or a successor organization absolutely essential for the work of the programme, it was planned that the new contract had to be in place at the end of May 1998. The tender process was planned in such a way that there was no interruption following the end of contractual arrangements with the EHRF at the end of May. A slight delay, however, resulted in the written procedure for the commitment of funds being overtaken by the Court of Justice ruling 106/96, which effectively blocked all new commitments until the end of July 1998. The decision of the Court of Justice with regard to budget lines without agreed legal bases has only served to confirm that the environment of the programme was stormy and uncertain. The securing of technical assistance to follow up on the arrangements with the European Human Rights Foundation was thrown into doubt at the last minute by the ruling, and numerous important projects were at best going to be delayed.<sup>208</sup> This temporary freeze of the budget lines of Chapter B7-7 has thrown human rights management into a crisis: the Director General was incapable of handling the policy work and the communications with applicant organizations without support. After May 1998 the decision not to proceed with the contracting of the European Human

Rights Foundation and the establishment of the SCR<sup>209</sup> made the Commission face new challenges that had not been considered before.<sup>210</sup> At the Foreign Affairs Committee on 28 October 1998, Mr McMillan-Scott reported that the Commission would not renew the contract with EHRF. According to the report, the Commission

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<sup>208</sup> HAEU, AV-71, Document on the 1998 Approach to Human Rights, s.d, s.f.

<sup>209</sup> Joint RELEX service for the management of Community aid to non-member countries.

<sup>210</sup> For more information see HAEU, AV-80, Note to Mr. Burghardt, Director General, Subject: Human Rights Budget: Current Situation. , Angel Viñas, 23 October 1998, AV/JL D(98).

used purely technical problem, which could have been resolved, as a pretext to end the cooperation with EHRF.<sup>211</sup>

The newspapers in that period talked about “extremely grave”<sup>212</sup> consequences. According to *The Guardian* the Human Rights Program was run and founded through the EHRF to promote rights all over the world, but in voting the funds to achieve this end, the parliament failed to vote funds for the administrative means and proper legal basis to carry them out. It seemed the Commission allowed the foundation to finance its own administrative and monitoring costs out of operational budget, a procedure of dubious legality. This has panicked the Commission, already battered by a wave of fraud and maladministration scandals. An article of the newspaper dedicated to the issue wrote “To get out of the mess, the Commission has decided to close the foundation and start again with the plan for a new independent agency to support human rights”.<sup>213</sup>

Within the Commission, the creation of a new settlement became one of the core issues between 1998-1999. There were arguments both in favour of a new human rights agency (i.e. increased visibility and operational capacity) and against it (i.e. loss of political influence of the Commission as well as a lengthy and difficult process). Before launching such a proposal, the Commission needed however, to clarify the Agency’s remit and decide on the allocation of its own resources.

Despite the negative developments brought confusion to the management of the human rights budget lines, in that context the idea of a EU Agency for Human Rights has come again to the discussion table. The creation of a new structure was proposed several years before, by the DGVIII and discussed by the RELEX Director General. The proposal was left aside because it was limited to developing countries. The European Parliament, in its Lenz Report<sup>214</sup> and the draft Roubatis report, had already also tabled the idea. Also the Vienna Conference on the Human Rights EU Agenda for

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<sup>211</sup> HAEU, AV-81, Note for the file, Subject: Debate in Parliament on the implementation of the Human Rights and Democracy programmes and on the contract with the EHRF. , Reinhold Hack, Brussels 29 October 1998, DG1A.3/RH/lac, (confidential).

<sup>212</sup> HAEU, AV-81, New Human Rights body planned in wake of Brussels bungling, *The Guardian*, Martin Walker in Brussels, 9 November 1998.

<sup>213</sup> Ibid.

<sup>214</sup> Report on setting up a single co-ordinating structure within the European Commission responsible for human rights and democratization. Rapporteur: Mrs. M. Lenz. 4 December 1997. A4-0393/97. See HAEU, AV-81, Information Note, Subject: Human rights Agency, Carmen Marques Ruiz, Brussels, 9 November 1998, DG1A/A2/CMR D(98) hragl.

the year 2000, on October 1997, proposed the creation of an European Human Rights Monitoring Agency.<sup>215</sup>

The initial idea for the creation of an Agency was about to start from the model of the structure of the European Monitoring Centre on Racism and Xenophobia (EMCRX) adding to it an Advisory Committee and a General Assembly of NGOs. The Agency should have been an independent organism in which the EU institutions would participate but which they would not control. However, despite the new agency could have been a new symbol to commemorate the 50<sup>th</sup> year anniversary of the Universal Declaration of Human Rights and could have favoured the quick mobilization of financial resources, the starting of this project was considered premature due to the Commission's situation, which was undergoing a period of reflection on structural reform. Moreover it was underlined the risk of duplication of structures and the subsequent creation of rivalries between the Agency and the Commission. Finally it could not be hid the general scepticism due to the uncertain legal status of this kind of agency.<sup>216</sup>

In 1998 the European Union faced many developments driven by a sort of incertitude about the future. Those developments included the judgement of the Court of 12 May 1998; the sector letter of the Court of Auditors on the European Human Rights Foundation of 30 September 1998 and the final decision not to proceed with the contracting of the European Human Rights Foundation. Considering that, since the 1980s the European Commission has been entrusted by the European Union with the task of implementing activities to promote human rights in third countries, and to vote for a series of geographical specific budget lines, most of the consequences of this critical years directly addressed the Directorate General for External Relations, DG IA, which was the structure in charge of the Human Rights sphere.

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<sup>215</sup> Leading by example a human rights agenda for the European Union for the year 2000. Agenda of the Comité des Sages and Final Project Report. Florence 1998. See HAEU, Ibid. 23

<sup>216</sup> According to the Maastricht Treaty human rights fell within both Community competences and CFSP competences. Therefore the creation of an EU Human Rights Agency would require the adoption of two kinds of instruments: a regulation and a joint action. At Community level, the Agency should create by a Council regulation having as a legal basis art. 235 TEC, art.130w TEC (Community development policy) and Article F par.2 (respect of fundamental rights by the EU). At CFSP level, a joint action based on art.J3 TUE would have to be adopted by the Council.<sup>216</sup> At that point, once Amsterdam treaty entered into force, the creation of the Human Rights Agency could have been the subject of a common strategy adopted by the European Council, based on art. 13 par.2 of the Treaty. See HAEU, AV-81, Information Note par. 7 What a European Agency on Human Rights could be, Carmen Marques Ruiz, Brussels, 9 November 1998, DG1A/A2/CMR D (98) hragl.



Despite the obstacles, the human rights activity, which during the previous years (always under the Directorate) evolved from a kind of activities based on verification and possible sanction to another based on constructive engagement and dialogue, tried to maintain the same approach, bearing obviously some reorientation and adjustments. This approach was characterized by focus on key priorities and ensuring support to the transformation of the transition countries, many of which were to become members of the EU. The thematic priorities remained support for democracy, the rule of law, development of a pluralist democratic society, and support for confidence building measures<sup>217</sup>. According to official sources the emphasis remained on a positive, practical and constructive approach to the support of democracy and the promotion of human rights, both through NGO activities and through international organizations, using the full range of instruments, among which training, seminars, advisers etc.<sup>218</sup>

### 3.4 SAVING EIDHR

In 1997, three years after the launch, EIDHR was carefully and systematically built upon a wide range of experiences. The initiative had incorporated many of the lessons learned by the European Commission in dealing with issues not only in Europe but also in other part of the world. Last but not least it had increased the awareness of possibilities for effective actions.

The Initiative provided added value in relation to the other Community instruments, it complemented the Community programmes carried out with governments such as the EDF, TACIS, ALA, MEDA, CARDS, PHARE and the rapid reaction mechanism (RRM), and it could be implemented with different partners, particularly NGOs and international organizations.

At this point it was time to handle the Initiative with a strategic purpose. This involved the need to graduate from the all-encompassing approach followed in the past, and which had been absolutely invaluable in order to obtain field experiences, which the EU was lacking. New challenge was to identify a more sophisticated line of action which

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<sup>217</sup> HAEU, AV-80, File Note, Technical assistance to the Unit dealing with human rights (first in the Secretariat General and subsequently DG IA), Brussels, 18 November 1998, D(98).

<sup>218</sup> HAEU, AV-63, Briefing for Commissioner Van den Broek, Speaking Notes: 1. 1998 Approach to Democratization and Human Rights, Foreign Affairs Committee, 30.06.1998.

should make the Initiative supportive of the broad orientations pursued by the EU in contributing to the strengthening of societies which, while still in transition, have made such progress that in many cases the prospect of Union membership has become an immediate policy goal.<sup>219</sup>

However, the 1998 new challenges, created some slowdown also in the EIDHR programme. On one hand they had an immediate and potentially disastrous impact on work in progress on human rights and democratization supported through the 1998 budget. On the other, they had an impact on the longer term inter-institutional relationship between the Council, the Parliament and the Commission. As far as concern the immediate problem of which the 1998 budget was concerned, following the ruling of the Court of Justice on the 12<sup>th</sup> May 1998, the Commission decided on 10<sup>th</sup> June to suspend all new activities on affected budget lines, pending a thorough review. It was in such a way that all new commitments and contracts on Chapter B7-7 the European Initiative for Democracy and Human Rights, were stopped.<sup>220</sup> Mary Robinson, addressing the European Parliament on the 23<sup>rd</sup> June of the same year, drew attention to the tragic juxtaposition of the 50<sup>th</sup> Anniversary of the Universal Declaration of Human Rights and the stand-still problems of the Human Rights and Democratization activities of the European Commission. According to her speech, many NGOs and other organizations were seriously affected by the suspension of funding and were raising their voices in protest at the injustice of an inter-institutional dispute affecting the fight for human rights led by organizations and individuals who have counted on the EU for support.

Following the ruling of the Court, the Commission decided on 10 June to examine all budget lines without a legal base and to suspend their execution temporarily. During the review the Commission decided to suspend new commitment, but to pay for the already committed.<sup>221</sup> On June 23, a Budgetary triologue took place between the budgetary authority (the European Parliament and the Council) and the Commission. In that context the Council, the European Parliament and the Commission had a thorough and constructive discussion on the situation created by the Court ruling and on possible decisions to be taken both for the execution of the 1998 budget and for future budget

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<sup>219</sup> HAEU, AV-63, Information note on the state of play of the EU human rights regulation, Jeremy Lester, Directorate General 1A Office, Brussels 1998.

<sup>220</sup> HAEU, AV63, Briefing for Commissioner Van den Broek, Impact of the Court of Justice Ruling C-106/96, Foreign Affairs Committee 30.06.98.

<sup>221</sup> (IP/98/520) See HAEU, AV63, Budgetary triologue, Note bio aux Bureaux Nationaux, Martine Reicherts, Bruxelles, 24.06.1998.

exercises. In the end the institutions agreed on a specific Action Plan according to which the Council and the Parliament had to accelerate the adoption of legal bases for which the Commission had already made proposals. The Commission had to intensify 19 legal proceedings that were not concluded yet, and to accelerate its assessment of the budget lines concerned in the 1998 budget with a view to providing results for the subsequent meeting of 17 July 1998 between the Budget Council and the European Parliament.<sup>222</sup>

Between May and August 1998 the European Commission for the External Relations worked strenuously to find a solution that could have ensured a legal continuity for the Chapter B7-7 of the budget. Having the Commission the responsibility and the obligation to ensure the proper management and an appropriate follow up of decisions already taken, the DG IA office proposed to launch an urgent procedure for the commitment of funds from the 1998 budget to permit retroactive addenda to each of the three expired contracts between the EHRF and the Commission. The addenda had to be dated from the date of expiry of the previous contract (in order to maintain the legal continuity) until 31.12.1998.<sup>223</sup>

Further support was the subject of the tender process launched early in 1998 but, owing to problems originating outside the Commission, the latter was unable to sign a contract. Commentaries in the 1999 budget then permitted the organization of a tender in conformity with the financial regulations and the inter-institutional agreement of 1998, then extended to cover 1999, which resulted from the European Court of Justice ruling C/106/96.

As expected the new tender procedure was not completed before the latter half of that year, with funds to be committed under the budget for the year 2000, even if the need for assistance was immediate. Therefore a contract by direct agreement with the EHRF was proposed for a period of 12 months thus allowing time for the new tender procedure to be completed.

The consequence of the *United Kingdom v. Commission ruling*, on Human rights projects legal basis<sup>224</sup> was that the implementation of the budget line was suspended during at least two months and could only be resumed by virtue of an inter-institutional

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<sup>222</sup> Ibid.

<sup>223</sup> HAEU, AV-63, Draft Note to Mr J.-P. Mingasson – Director General DG XIX, For the attention of Mr J. C. Brouwers-pour avis et commentaire de la part de Angel Viñas soulignant qu'il s'agit dès propositions esquissées en consultation informelle avec les représentants de la DG 19 et 20. , Gunter Burghardt (Director General IA), Brussels, 24 June 1998.

<sup>224</sup> C-106/96 United Kingdom v. Commission (1998) ECR I-2729.

agreement. United Kingdom versus Commission, coupled with Opinion 2/94 on *Accession to the European Convention of Human Rights*<sup>225</sup>, raised important doubts on the reach of the EC competences in the field of human rights. Within this context, the Commission proposal of Council regulation gave rise to an inter-institutional dispute which lasted, at least, two years.

The disputed question of the legal basis was finally solved by the enactment of two Council Regulations in 1999, which were based on the Commission proposals. Council Regulations 975/1999<sup>226</sup> and 976/1999<sup>227</sup> provided the legal base for implementing appropriations in Chapter B7-7. The Regulations “on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms” under Articles 235 and 130W of the EC Treaty came into effect on 11 May and provided a legal basis for all human rights and democratization activities under Chapter B7-70 of the EU budget by the Council of Ministers of the European Community. However, according to the Interinstitutional Agreement (IIA) of 6 May 1999, these figures were not binding on the Budgetary Authority, as the legal basis had not been adopted under co-decision.

Under Article 308 and 179 of the EC Treaty<sup>228</sup>, as modified by the Amsterdam Treaty, the regulations provided a genuine legal basis for the awarding of financial aid for the promotion of human rights and democracy in third countries and improved the transparency of the procedure. On the one hand, a Committee composed of representatives of the Member States was set up in order to discuss general guidelines, assists the Commission in the implementation of the budget and delivers its opinion on projects over 1 million Euro<sup>229</sup>. Then, following the enactment of the

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<sup>225</sup> I am referring to the paragraph saying that no treaty provision confers upon the Community any general competence to enact rules on human rights or adhere to conventions in the field.

<sup>226</sup> Council Regulation (EC) No. 975/1999 of 29 April 1999 “laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms” in OJ L 120/1 of 8.05.1999.

<sup>227</sup> Council Regulation (EC) No.976/1999 of 29 April 1999 “ laying down the requirements for the implementation of Community operations other than those of development cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries” In OJ L 120/8 of 8.05.1999.

<sup>228</sup> Respectively ex articles 130w and 235.

<sup>229</sup> The Committee was called Human Rights and Democracy Committee and started its work in July 1999. It was chaired by the Commission and composed by representatives of the 15 Member States.

regulations, a call for proposals for most of the budget headings was launched in June 1999.<sup>230</sup>

Albeit the two regulations solve the question of the legal basis, they were mere financial regulations which did not address important flaws in the implementation of the budget lines: they did not provide a legal basis for promoting human rights within the EU; they did not establish fresh strategies or contain priorities and they did not provide adequate rules for monitoring the situation or providing a follow-up of the projects undertaken. A 1999 special report of the Court of Auditors *“on the management by the Commission of European Union support for development of human rights in third countries”* provided strong criticism of the above-mentioned points. On the question of strategies, the report stated: “...the Court found little evidence that the Commission had effectively assessed the democracy and human rights situation and needs of beneficiary countries and that it had developed a strategy specifically tailored to the requirements of the country (identifying key problems and proposing solutions.”<sup>231</sup> In addition, on the question of follow up it was provided that: “...in general, however, the Commission paid a little attention to the question of whether the activities would continue after its financing stopped. The approach of the Commission was primarily focused on annual financing programmes and did not seek to follow up activities once the financing had stopped”.<sup>232</sup>

### 3.5 THE MAIN ISSUES CONCERNING THE COMMISSION'S INSTRUMENTS

#### 3.5.1 AIDCO V. DG RELEX: HOW MANY BUDGET LINES?

The European Commission allocated over €100 million for human rights and democracy projects throughout the world in financial year 2000, under EIDHR, Chapter B7-7 of the EU Budget. The EU Commissioner for External Relations, Chris Patten<sup>233</sup>

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<sup>230</sup> This seemed to be a major improvement, as like the Court of Auditors has said in its report on the management of the Commission budget, in the recent past, these contracts were often given under a “private treaty” basis. The Court of Auditors also welcomed this new procedure and stated that “the overall transparency of the selection procedures is enhanced”.

<sup>231</sup> Paragraph 22 of the report.

<sup>232</sup> Paragraph 47 of the report.

<sup>233</sup> In 1999 Chris Patten was appointed as one of the United Kingdom's two members to the European Commission as Commissioner for External Relations where he was responsible for the Union's

described the allocation as “a tangible affirmation of the EU's obligation to promote human rights and democracy world-wide”<sup>234</sup>. Substantial support was allocated to international organizations, including the UN, the OSCE and the Council of Europe, with over €5 million for different projects of the UN Office of the High Commissioner for Human Rights. Moreover, emphasizing the EU's commitment to develop its partnership with non-governmental organizations and civil society, who have always been important actors in the defense of human rights and democracy, the vast majority of the funds began to be channeled through such NGOs. However, behind this promising future for human rights, the fight for new achievement continued, and new reforms were going to take place soon.

Until the 2000 budget, the EIDHR has been an amalgaman of a series of budget lines, some thematic and some with specific geographical scope. In 2000, eleven different geographically based human rights and democracy budget lines were adopted by the Budget Authority to provide the Community support for specific areas.

In order to distinguish the work on human rights from that on mainstream programmes (EDF, ALA, Med, Phare, Tacis, Obnova), a radical reform needed to be done to make all the budget lines of the chapter thematic. This would have matched the new regulations (which listed the concerns to be covered), it would have implied a fresh approach to technical support, and would have made clearer the relations with geographical services. According to the Directorate for External Relations “In this options is to be followed, then a revised proposal should be put to DG Budget for submission to the budgetary authorities, for the 2001 draft budget preparation is well under-way. The reform if decided, would be a radical and visible way to give effect to the regrouping decided by the new Commission. A thematic approach should then be used in any future technical assistance to the Commission.”<sup>235</sup> In other words, the idea was that priorities should have been identified in terms of themes or issues aimed at addressing specific medium to long-term goals. They should have not been defined on the basis of activities, such as human rights training, nor should have they been defined in terms of target groups. Where the EC wished to enhance the impact on the rights of certain groups (for example women, children and indigenous peoples), this should have been

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development and cooperation programmes. He held this position within the Prodi Commission from 23 January 2000 until 22 November 2004.

<sup>234</sup> “European Press Release Database, “€100 million allocated to 'European Initiative for Democracy and Human Rights'”, IP/00/1475, Brussels, 15 December 2000. See: [http://europa.eu/rapid/press-release\\_IP-00-1475\\_en.htm](http://europa.eu/rapid/press-release_IP-00-1475_en.htm)

<sup>235</sup> HAEU, AV-92, Briefing Note Prepared by Jeremy Lester (DG ER/B/2) Meeting with the Commission services on 13 January 2000.

addressed in the project design and the selection methodology. In line with the EC's Development Policy Statement, the Commission had to ensure that promotion of gender equality, and of children's rights would have been mainstreamed in all thematic priorities pursued under the EIDHR. The same approach had to apply to the rights of indigenous people, in line with the Commission's working document and the Council's Resolution, which called for respect for the rights of indigenous peoples to be integrated as a cross-cutting aspect at all levels of development cooperation, including policy dialogue.

At this regard the Commission proposed four thematic priorities for the EIDHR programme for 2002 and in the medium-term, which were (1) Support to strengthen democratisation, good governance and the rule of law, (2) Activities in support of the abolition of the death penalty, (3) Support for the fight against torture and impunity and for international tribunals and criminal courts, (4) Combating Racism and xenophobia and discrimination against minorities and indigenous peoples.<sup>236</sup> Grants for the 140 projects selected, under the guidelines of the Human Rights Regulations and after consultation with the Human Rights Committee and the appropriate geographical desks and delegations, ranged in size from €55,000 to €2 million.<sup>237</sup>

In 2001, the Commission services successfully argued for a significant reduction in the budget lines, rising in 2001 the number of five lines under Chapter B7-7. In the same year the Commission services responsible for Human Rights and Democracy (notably AIDCO and RELEX)<sup>238</sup> had to deal with five major tasks, which were; the management of the on going Human Rights and Democracy programme (724 projects, distributed amongst 5 Budget lines); the identification of up to 150 new projects worth 102 million euro (involving the analysis of some 750 project proposals, once again divided into 5 different budget lines); the preparation and identification of strategies, budgets and procedures for managing projects and programmes in 2002 and beyond; winding down the EFHR whose contract was going to expire on 31<sup>st</sup> May 2001; and lastly defining a new political framework for Human Rights, Democracy and Prevention of Conflict ( new Communications from the Commission to the Council and Parliament).

This was an enormous workload, and in such a politically sensitive field, two different lines of thinking took place. If one side there was the DG AIDCO proposal to further

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<sup>236</sup> HAEU, AV-83, An updated strategy for the European Initiative for Democracy and Human Rights (EIDHR – Chapter B7-7 of the EU budget), Brussels, 15 March 2000.

<sup>237</sup> Ibid.

<sup>238</sup> Europaid Cooperation Office

reduce the budget lines from five to one, and in so doing concentrating on the essentials, reducing needless bureaucracy, inspiring confidence amongst Member States and the Parliament and improving budget management and efficiency; on the other side the proposal of a modification of budget lines was seen by the DG RELEX as a reason of confusion and incertitude.<sup>239</sup>

According to AIDCO “there was absolutely no intellectual justification for more than one Human Rights and Democracy budget line in 2002”<sup>240</sup>. In support of the office proposal there was the fact that additional budget lines involved an extra set of commitment and payment targets, an extra set of specific objectives and results expected, an extra set of specific procedures, extra explanations to beneficiaries, delegations and others who had to deal with each financial instrument, extra statistical and monitoring requirements, and of course extra human resources. The AIDCO office strongly affirmed that the Commission didn’t have the capacities to afford such “luxuries”. Moreover, once the Budget commentaries were drafted in a clear and transparency way, and considering the Budget Authority trusted that the Commission would have delivered what it wanted it to deliver, there was no reason in adding extra budget lines. In support of this new settlement there was also the fact that the creation, historically, of a mass of separate budget lines to respond to Parliamentarians wishes was a reflection, at that time, of a lack of confidence in the Commission. AIDCO retained with the new century it was time to break the cycle and prove it was not necessary to create extra budget lines to make a political point. Having a unified approach would have brought many advantages: streamlined management and procedures; clear and unified geographical and thematic priority setting; possibility of fewer, larger projects/programmes having greater impact and visibility; lack of confusion and arbitrary classification of projects into overlapping sectors more efficient use of limited human resources. In a *note de dossier* it was specifically reported “We have discussed the proposed fusion of HRD Budget Lines with a number of Parliamentarians including Terry Wynn MEP, Chairman of the Budget Committee and Matti Wouri MEP, Rapporteur for Human Rights and Democracy in Foreign Affairs Committee. They both

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<sup>239</sup> The number of Human Rights lines was initially reduced from 11 lines to 3(B7-701, B7-702,B7-703 reflecting the 3 objectives in the regulations) plus 2 additional sectorial lines added by the Parliament in its second reading (International criminal tribunals B7-704 and electoral process B7-709).

<sup>240</sup> “There may have been a case in 2001 where the transition from 11 to 1 would have been an enormous leap”. See HAEU, AV-83, Note de Dossier, Subject: Why we need to reduce, simplify and rationalise the number of Human Rights and Democracy Budget Lines managed by the Commission services in 2002. Brussels, 16<sup>th</sup> March 2001, Europeaid Cooperation Office, European Commission.



support this approach, whilst of course giving the usual caveats about the need to sell this idea of their colleagues.”<sup>241</sup>

The organization of new budget lines became the main object of an exchange of notes between the two opposed offices, raising the level of a true “battle of paper” that lasted for different months.

In response to AIDGO the DG RELEX raised several arguments against this fusion. First of all the fact the Parliament would have opposed such a change, secondly the need to leave more time before applying a further change and lastly the conviction of the opposition that such fusion would not have resulted in any major improvement. The Europaid office, on its side, strongly opposed such affirmations, asserting the Commission had no choice but to continue to accelerate its reform programme. “Waiting another year will only exacerbate our management problems and mean that the concrete results of these reforms will only appear in 2005”.<sup>242</sup>

On 20 March 2001, four days after sending of the note de dossier of DG AIDCO, a note was drafted by the DG RELEX responding to the AIDCO statements, explaining the reasons in favour of the maintenance of five budget lines. The note reported that simplification and rationalisation of the budgetary procedure was important in the Commission reform, and shared by everyone, nevertheless the fear of new challenges due to a further reduction of budget lines were palpable. The DG RELEX explained how, following the Commission decision in 1999 to create a single unit within DG RELEX with the overall responsibility for human rights, it had been possible for the first time during 2001 budget procedure to propose a simplification of the lines. Thereby, from the office point of view, the Commission had already obtained a significant concession on the part of the budgetary Authority in the 2001 Budget. Furthermore, not only the Parliament was concerned with transparency in the budget, but one of the goals of the new nomenclature (the shift from eleven to five lines), being an important modification, was to make it a guide for making the goals comparable from year to year. The further modification would have only created difficulties in this sense. To conclude, the DG RELEX underlined the importance in that particular moment to prove the positive impact of the already done reduction, before making a further modification,

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<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

and gave its consent only for eliminating the two additional sectorial lines (International criminal tribunals B7-704 and electoral process B7-709), maintaining the 3 main ones.

During the budgetary hearing on 15 March 2001 AIDCO and RELEX presented their different views on the issue of 1 or 3 lines. DG BUDG<sup>243</sup> supported the view of maintaining the budget structure with 3 lines for reasons of coherence and credibility towards the Budgetary Authority. Against the proposal of one line there was the belief that it would have raised an issue of credibility towards the Parliament –asking for a further change without evidence of the value of the earlier change, it would have not respected the spirit of transparency in management as requested by the Budgetary Authority, it would have led to an other foreseeable difficult discussion with the Parliament over the budget, and finally it would have been incoherent with the message delivered throughout previous year towards the Parliament and the Council from the DG's involved (RELEX and BUDG).<sup>244</sup>

This intra-office discussion showed how implementation of the EIDHR has repeatedly been the subject of scrutiny, analysis and evaluation, particularly in 2000 and 2001, including by the Court of Auditors.<sup>245</sup> Pertinent recommendations were taken into account both in the 2001 Commission Communication and the subsequent EIDHR programming for 2002-2004. During the programming period 2002- 2004 itself, the most relevant and representative scrutiny of the EIDHR stemmed from an Extended Impact Assessment carried out in 2003<sup>246</sup>, and from five regional EIDHR conferences

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<sup>244</sup> AV 83 Briefing Note Dubject: the RELEX position on the preparation of the 2002 budget on Human Rights and Democracy Budget lines, Brussels, 20 march 2001, Veronique Bagge.

<sup>245</sup> Report on the implementation of the European Initiative for Democracy and Human Rights in 2000, SEC (2001) 801; Evaluation of voter education in the context of EU electoral support, Final Report, September 2001; Synthesis report on EC activities in the field of human rights, democracy and good governance, Reference Report, August 2001; Synthesis report on EC activities in the field of human rights, democracy and good governance, Synthesis Note, August 2001; Evaluation of the micro projects facility operating under the European Initiative for Democracy and Human Rights, Final Report, October 2001, Eva-EU Association; European Initiative for Democracy and Human Rights, Compendium 2000; European Initiative for Democracy and Human Rights, Macro-projects, Compendium 2001; European Initiative for Democracy and Human Rights, Micro-projects, Compendium 2001; Information document: European Commission actions relating to project funding aimed at promoting the setting up of the International Criminal Court, EuropeAid Office for Cooperation; Thematic evaluation of the integration of gender in EC development cooperation with third countries, Final Report, March 2003; see: <http://europa.eu.int/comm/europeaid/projects/eidhr/>; Court of Auditors, Special Report No 12/2000 on the management by the Commission of European Union support for the development of human rights and democracy in third countries, together with the Commission replies (2000/C 230/01), OJ C 230, 10.8.2000, p. 1

<sup>246</sup> SEC(2003)1170: EIA carried out in preparation for the Commission's proposal on the extension of Regulations (EC) Nos 975/1999 and 976/1999

held with local, civil society-based beneficiaries and implementing partners.<sup>247</sup> In the context of the above-mentioned Extended Impact Assessment, a specific consultation of EIDHR beneficiary organizations took place in June 2003. Asked about their views on the relevance, effectiveness and impact of the EIDHR, the survey of stakeholders in third countries produced a generally positive assessment. General objectives of the EIDHR were highly relevant to the human rights and democracy needs. In terms of protection and promotion of human rights and democracy, the impact was positive and it gave effective contribution to strengthening the capacity of civil society organizations. However EIDHR still had many difficulties mostly due to its slowness in responding to the changing needs of civil society in recipient countries. A number of comments and observations from different European Partners concerned the need for more action at a regional level, and for the Commission to encourage networking and complementarity between civil society organizations, which received funding under the EIDHR. More EIDHR longer-term commitment became an always more relevant issue in order to increase the impact of activities. Many comments centered on the need for improved programming and implementation procedures. Even the selection procedures lacked in many aspects; a wider range of beneficiary organizations from third country civil society needed to be supported, and the speed of decision-making by the Commission and the length of time required to prepare projects was a disadvantage to many NGOs in third countries. Other complains regarded administrative procedures, being them overwhelming and too complicated. Moreover, strict compliance with the concept of exclusive “focus countries”<sup>248</sup> has led to difficulties in identifying projects in almost half of the focus countries targeted through calls for proposals for macroprojects. This situation was aggravated in 2003, with the new Financial Regulation excluding the broad use of targeted projects by declaring them the strict exception to the general rule of project identification through calls for proposals.

### *3.5.2 WHO RECEIVED EUROPEAN FUNDS?*

In the first years of the 2000s, Sub-Saharan Africa has remained by far the major

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<sup>247</sup> In Dakar/Senegal for Western Africa; in Cape Town for Southern Africa; in Guatemala City for Latin America; in Almaty/Kazakhstan for Central Asia and in Kigali/Rwanda for Central Africa, in 2003 and 2004.

<sup>248</sup> Under the programming 2002-2004 only a “focus country” may be the target of EIDHR-supported projects (macro- or micro-projects), and their number is limited to 32 countries.

recipient of European democracy funding. Not surprisingly, Africa accounted for more than 80 percent of French governance aid, as France has always been heavily oriented toward officially Francophone states. Between 2000 and 2006, Africa received nearly 30 percent of EIDHR funds, while European democracy assistance from the EC to the Middle East remained disproportionately low. This was in part because the Gulf States were considered too rich to merit anything more than a handful of small reform projects. The one major exception has been the high level of support provided by nearly all European donors to the Palestinian Territories. The United Kingdom and Denmark created initiatives relating to Arab political reform, but such initiatives were limited in scale and were increasingly oriented toward “deradicalization” projects within Europe rather than political reform in the Middle East. Given their proximity and political fragility, the Balkan states would seem likely candidates for strong European support across the board. But there has been a surprising variation in political reform funding for the Balkans from their EU neighbors. For some donors, the shifting of focus away from Central and Eastern Europe following the EU’s enlargement into that region allowed the Balkans to become a priority. Balkan states have, for example, benefited greatly from EC aid, with Brussels channeling large sums into Serbia and Montenegro for institution-building since the early 2000s, as well as a €225 million allocation specifically for democracy support between 2002 and 2004.<sup>249</sup> At the same time, however, the Balkans receive only a small share of overall democracy aid from most EU member states, and some—most notably, Germany—have actually reduced their democracy funding to the Balkans. Moreover, European funding has only slowly shifted away from reconstruction toward democracy-building.

In 2006, the European Instrument for Democracy and Human Rights (EIDHR)<sup>250</sup> has been created, replacing the erstwhile European Initiative for Democracy and Human Rights.

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<sup>249</sup> Richard Youngs, What has Europe been doing?, *Journal of Democracy* Volume 19, Number 2 April 2008, National Endowment for Democracy and The Johns Hopkins University Press

<sup>250</sup> The legal basis [Regulation (EC) No 1889/2006 of 20 December 2006] for the successor programme to the European Initiative for Democracy and Human Rights was adopted by the European Parliament and the Council in December 2006. The Regulation, which entered into force on 1st January 2007, established a new financing instrument for the promotion of democracy and human rights worldwide (EIDHR). It reflected the high political profile and specific Treaty mandates relating to the development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms. The Regulation’s principal objectives reflected the Commission Communications on EU Election Assistance and Observation, on the EU’s role in promoting human rights and democratization in third countries and on a Thematic Programme for the promotion of democracy and human rights worldwide under the future Financial Perspectives 2007 2013, as well as the EU Guidelines on Human Rights.

The new EIDHR spread its resources by funding projects in many countries. Nearly €30 million of the 2007 budget of €135 million were set aside for “difficult states”, including Belarus, Burma, China, Cuba, Syria, Tunisia, Uzbekistan, and Zimbabwe, that historically had been neglected. The remaining 2007 funds were divided among 47 states, with each generally receiving between a half million and 1.5 million euros. Nearly a quarter of the funds overall were still going to Latin America. Some Commission development programs have been especially dedicated to governance, as in Azerbaijan and Ukraine. More often, however, in Afghanistan, Cambodia, China, Pakistan, Russia, and Vietnam, for instance, only a tiny share of EC aid went to good-governance projects. Monies available under the EC’s Rapid Reaction Mechanism<sup>251</sup> (renamed the Stability Instrument in 2007)<sup>252</sup> have increased, but they funded only a few projects related to democracy building, including election support in Georgia, Iraq, and Ukraine, plus efforts to bolster state capacity in Afghanistan.<sup>253</sup>

From the beginning civil society actors within and around the EU remained critical of how the EIDHR was still essentially unreformed, despite the overhauling of the instrument. The EIDHR in fact, could be awarded directly to civil society actors without government consent, but more often than not the EU allowed host governments to decide where funds had to be allocated. In addition, the EU has often shown itself extremely reluctant to offer financial support to the political opposition to authoritarian regimes, even though some of its member states have done. While this reflected a desire of the European Commission to ensure that its aid were impartial, disappointment became widespread as the EU did little to support the democratic revolutions in Eastern Europe.

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<sup>251</sup> Council Regulation (EC) No 381/2001 of 26 February 2001 creating a rapid-reaction mechanism [Official Journal L 57 of 27.02.2001]. This Regulation created a mechanism to enable rapid action to be taken in specific areas in response to or avoid real or potential crisis situations or conflicts. Financing took the form of grants, and the Commission, with the help of its partners, was the institution responsible for implementing, coordinating and evaluating the mechanism.

<sup>252</sup> Regulation (EC) No 1717/2006 of the Parliament and of the Council of 12 November 2006 establishing an Instrument for Stability.

<sup>253</sup> Ibid.

## 3.6 FROM LOME' TO COTONOU: FROM SANCTIONS TO DIALOGUE

### 3.6.1 LOME' IV BIS

Lomé Conventions expired with the entry into the new millennium. Until the year 2000, four Lomé conventions were signed, and each one of them aimed to have a broader and enhanced relation between the partners.

As already analysed in the first chapter, the 1970s and 1980s gave birth to three Lomé Conventions, but after the adoption in June 1981 of the African Charter on Human and Peoples' Rights<sup>254</sup> by a great number of the African members of the ACP group, and the end of the Cold War in 1989, the need for a renewal of the last Convention started to spread. Despite this “winds of change” at the negotiations for the Lomé Convention IV the inclusion of human rights references into the Convention itself was hardly contested.

Lomé IV (1990-2000) had some different features than the others. It became the first development agreement to incorporate a human rights clause as a “fundamental” part of cooperation. Further changes were made at Lomé's IV revision five years later (1995-2000), where an updated clause confirmed the importance of human rights in cooperation. In particular, while the preamble to Lomé IV contained references to some of the main relevant human rights instruments, Article 5(1) of Lomé IV for the first time drew a direct link between development cooperation and human rights<sup>255</sup>. Having succeeded in incorporating references to human rights within the Lomé IV provisions on development cooperation, the EC proposed the introduction of an explicit suspension mechanism in order to strengthen the force of Article 5.<sup>256</sup> This was accomplished during the 1994 Mid Term Review of the Lomé IV Convention with the

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<sup>254</sup> Concluded on 26 June 1981, entered into force on 21 October 1986, OAU Doc CAB/LEG/67/3 Rev. 5, reprinted in: 21 ILM 59 (1982).

<sup>255</sup> Article 5(1) of the Lomé Convention IV states that:

Cooperation shall be directed towards development centered on man, the main protagonist and beneficiary of development, which entails respect for and promotion of all human rights. Cooperative operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognised as a basic factor of real development and where cooperation is conceived as contributing to the promotion of these rights. In this context development policy and cooperation are closely linked with the respect for and enjoyment of fundamental human rights. The role and potential of initiatives taken by individuals and groups shall also be recognised and fostered in order to achieve in practice real participation of the population in the development process in accordance with Article 13.

<sup>256</sup> Karin Arts/J. Byron, The Mid-Term Review of the Lomé IV Convention: *Heralding the Future?*, 18 THIRD WORLD Q. 73, 77 (1997).

incorporation of respect for human rights, democratic principles, and the rule of law as essential elements of the Lomé IV and a new Article 336a Lomé IV-bis which allowed for full or partial suspension of the application of Lomé IV in the event that “any party fails to fulfil its obligation in respect of one of the essential elements” (human rights, democracy, and the rule of law); however, such a suspension could only take effect after a consultation procedure had taken place.

Over the years the EU has found this “stick approach” a useful weapon to deploy against ACP governments implicated in human rights violations. It has unilaterally suspended Lomé benefits due to several ACP countries. In 1994, EC aid to eight ACP countries<sup>257</sup> was suspended or restricted because of the security situation and those countries’ failure to move towards democracy or observe human rights.<sup>258</sup> In April 1999, the Commission proposed to the Council to open Article 366a Lomé IVbis consultations with Niger in response to the coup in that country. In a communication the Commission announced “in the meantime no new funding will be approved in favor of Niger other than for humanitarian projects directly benefiting the poorest sections of the population.”<sup>259</sup> The EU also held Article 366a Lomé IV-bis consultations with the Government of Togo in 1998 and with the military Government of Comoros after the coup there in April 1999.<sup>260</sup>

After the expiration of Lomé IV on 29 February 2000, the new partnership agreement between the European Union and the ACP countries was signed on 23 June 2000 in Cotonou, capital of Benin. The Cotonou Agreement introduced a new approach and a broader partnership while preserving the fundamental instruments of the partnership from the Lomé Conventions. Its aims were to strengthen the political dimension of the partnership, and to leave more space to the ACP countries for the implementation process of the policies by giving them more responsibility as the owner of the development projects.

Cotonou represents according to some scholars the reason why even though the human rights clause has become a familiar feature of EU external agreements, it was not until the entry into force of the Treaty of Nice in February 2003 that a satisfactory

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<sup>257</sup> The ACP Countries are Equatorial Guinea, The Gambia, Liberia, Nigeria, Somalia, Sudan, Togo, and Zaire.

<sup>258</sup> K. Arts, *Integrating human rights into development: The case of the Lomé Convention*, Brill Nijhoff, 2000.

<sup>259</sup> Commission, Communication on the Opening of Consultations with Niger pursuant to Article 366a of the Lomé Convention, 204 COM 3 (1999).

<sup>260</sup> M. Bulterman, *Human Rights in the Treaty Relations of the European Community*, 2001, pp.252-257.

legal basis for the human rights clause has been settled. Until the Treaty of Nice doubts have been raised, particularly in light of opinion 2/94 on Accession of the European Community to the European Convention on Human Rights (ECHR), in which paragraph 27 provided that “no treaty provision confers upon the Community any general power to enact general rules on human rights or to conclude international conventions on the field.”<sup>261</sup> Indeed, Australia for instance, with whom the Commission was negotiating a trade and cooperation agreement, had challenged the inclusion of a human rights clause in the agreement on the ground that the EC lacked competence to promote human rights in the light of opinion 2/94.<sup>262</sup>

The Treaty of Nice provided for the insertion of Article 181(a) in the EC Treaty on economic, financial, and technical cooperation measures with external countries, which encouraged EC action in this sphere to “contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.” The treaty provisions appeared to make respect for human rights one of the general objectives of development cooperation. Thus, officially from 2003, the legal basis for the support of human rights and democratization activities under the ACP-EU partnership could be found in Article 9 of the Cotonou Agreement. In particular, according to Article 9(4), “the Partnership shall actively support the promotion of human rights, processes of democratization, consolidation of the rule of law, and good governance.” Positive measures to promote human rights started to be pursued through a dual approach that combined both vertical and horizontal funding. Vertical funding within the context of the Cotonou Agreement has involved the EU providing direct funds from the EDF for the promotion of human rights and democratization activities. Along with direct financial measures to promote human rights and democratization, the EU has also incorporated human rights as cross-cutting issues in the formulation of development policy and in the programming and planning stages of development with ACP Countries. This approach was described as a horizontal approach and contributed to the notion of mainstreaming, which involved the integration of human rights norms into all aspects of policy-making and implementation.<sup>263</sup> One medium through which the mainstreaming has been accomplished is political dialogue. Through political dialogue, human rights

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<sup>261</sup> Elena Fierro, *The EU's Approach to Human Rights conditionality in practice*, 2003, p. 245

<sup>262</sup> *Ibid.*

<sup>263</sup> Communication from the Commission to the Council and the European Parliament, *The European Union's Role in Promoting Human Rights and Democratization in Third Countries*, 252 COM 11, 22 (2001).



started to be taken into account during negotiations for the accession to the ACP Group, although respect for human rights and democratic principles did not become a precondition for membership<sup>264</sup>.

### 3.6.2 COTONOU AND “KEY ROLE” OF DIALOGUE IN THE NEW PARTENERSHIPS

Political dialogue on the subject of human rights, the rule of law, democratic principles, and good governance has constituted a central feature of ACP-EU cooperation. According to Article 8 of the Cotonou Agreement, “the dialogue shall encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.”

A long-term dialogue could have been an element in the EU’s conflict prevention efforts, and have had an early warning role by highlighting at an early stage human rights and democratization issues which could in the future lead to violent conflict as well as contributing to their early resolution. In this sense the opening of the ACP-EC partnership to non-State actors has been a breakthrough in the Cotonou Agreement. The new approach had to go well beyond the experience gained until then as regards decentralized cooperation. It involved encouraging a genuine dialogue both on development policies and on ACP-EU cooperation. Civil society should have furthermore been associated to the political dialogue, and to the assessment of policy performance in the context of the reviews of ACP-EC Country Support Strategies.

Dialogue under Cotonou started taking place in an informal fashion with regular meetings of the human rights NGOs (the so called Human Rights Contact Group) with the Commission services and the Commissioner. The Vienna Council conclusions in December 1998 proposed to “reflect on the usefulness of convening a periodic human rights discussion forum with the participation of EU institutions as well as representatives of academic institutions and NGOs”. Three forums were held so far in

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<sup>264</sup> During negotiations for the admission of Haiti to the Lomé Convention in 1989, the Netherlands sought to include human rights commitments as a condition for membership. However, this was rejected by the majority of Member States who stated that the human rights situation had not been a precondition for the accession of existing ACP States and many of the Member States argued that accession to Lomé would be a positive step towards improving the human rights conditions in Haiti. After that, Cuba indicated its willingness to accede to the Cotonou Agreement; however, this application was subsequently withdrawn due to alleged interference in internal affairs on the issue of human rights.

cooperation with the Council Presidency<sup>265</sup> in order to achieve greater coordination between NGOs and to a shared platform.

Where institutionalized, the dialogue took different forms, and that with the accession countries was the most advanced. In its Opinions on the Central and Eastern Europe countries' applications for accession to EU<sup>266</sup>, the Commission analyzed the situation relating to democracy, rule of law and to human rights (civil, political, economic and social). These opinions also covered the respect and protection of minorities, including their right to maintain their cultural identity, to equal treatment in social and economic life, and protection against hostility from the majority population (and even the police). In line with the Agenda 2000 approach, the Commission assessed progress towards meeting the accession criteria in the Regular Reports on each country. This approach ensured coherence between the various EU instruments and institutions, as well as co-ordination with relevant international organizations such as the Council of Europe and the OSCE. Countries wishing to become members of the European Union were expected not only to subscribe to the principles of democracy, the rule of law, human rights (civil, political, social, economic and cultural rights) and the respect for and protection of minorities, but to put these into practice. In order to help the candidate countries remedy the specific weaknesses identified in the Regular Reports, the Community established an Accession Partnership for each of the candidate countries. They also indicated the financial assistance available from the Community in support of these priorities and the conditions attached to that assistance.

In its Communication on the Follow up to the Rio Summit<sup>267</sup> which proposed an updated approach to EU-Latin America relations, the Commission identified the promotion and protection of human rights as the main priority in the political field, including the need for new 'positive' measures to strengthen respect for human rights, the rule of law and democratic political systems. These included a proposal for an EU-Latin America/Caribbean discussion forum for the promotion and protection of human rights, based on the good experience gained in Central America where a committee of independent experts was set up under the San José Dialogue to discuss human rights. The group was tasked to submit a report with conclusions and proposals for action to

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<sup>265</sup> EU Discussion Forum, Brussels, 30 November and 1 December 1999 - EU Human Rights conference "The EU and the Central Role of Human Rights and Democratic Principles in Relations with Third Countries", Venice 25-28 May 2000 – EU Human Rights Forum, Paris, 13 December 2000.

<sup>266</sup> 15 July 1997 (Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia).

<sup>267</sup> COM(2000) 670 final.

the 2002 EU-Latin America Summit. The Commission's later Communication on "Reinvigorating the Barcelona Process"<sup>268</sup> also called for greater prominence to be given to human rights in Europe's relations with Mediterranean countries. It stated that these issues should be regularly raised by the EU side in political dialogue, and also with partners meetings, Association Councils and Committees with the intention of identifying measures which governments should take to ensure satisfactory evolution in this area. This dialogue could lead to the establishment of joint working groups on human rights at official level; these groups would have aimed to agree on a number of concrete benchmarks and objective criteria to be reviewed within the various Association Councils. With regional groupings in Asia, the EU has a political dialogue with the members of Association of South East Asian Nations (ASEAN), including annual Ministerial meetings, and meets with the SAARC.<sup>269</sup> The political dimension of Asia-Europe Meetings (ASEM) also permitted discussions on support for human rights, democracy and the rule of law.

### 3.6.3 THE LACK OF STRATEGIES

While the integration of human rights considerations into the ACP-EU partnership could have lead to some improvements in the human rights situation in ACP countries, the results has not been altogether satisfactory. Indeed, the application of human rights in the Lome/Cotonou regime has mostly been arbitrary with lack of transparency.<sup>270</sup> ACP countries such as Sudan and Haiti became targets of punitive measures by the EC<sup>271</sup> while other ACP countries such as Ethiopia and Zaire enjoyed continued EC financial

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<sup>268</sup> COM(2000) 497 final.

<sup>269</sup> The South Asian Association for Regional Cooperation (SAARC) is the regional intergovernmental organization and geopolitical union of nations in South Asia. Its member states include Afghanistan, Bangladesh, Bhutan, India, Nepal, the Maldives, Pakistan and Sri Lanka.

<sup>270</sup> According to Tomasevski, "much as with other donors, the practice was punitive and arbitrary." See K. Tomasevski, *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*, 1997.

<sup>271</sup> Article 96 of the Cotonou Consultation Procedure has been used in relation to both Haiti and Zimbabwe. In the case of Haiti, after the general elections in 2000 the observer mission of the Organization of American States (OAS) noted various irregularities and fraud. According to the EU, this constituted a breach of Article 9, the essential element clause of the Cotonou Agreement. The EU invited the Government of Haiti to enter into consultations under Article 96. Haiti did not respond to the EU's concerns and the Council adopted a decision on 29 January 2001 to take "appropriate measures" in accordance with Article 96(2).<sup>44</sup> These measures included suspending direct budgetary aid and withholding future aid from the European Development Fund (EDF). This Council decision was renewed in December 2001, 2002, and early 2003.

support. Both Ethiopia and Zaire have been prominent recipients of EC aid even though their human rights records were clearly abysmal.<sup>272</sup>

The explanation for this inconsistency lied in the fact that human rights were just one consideration guiding the foreign policy of the EU. Thus the fact that the various EU Member States had different political relationships with different ACP countries may have led them to develop different attitudes and measures in response to human rights violations. Moreover, the applicability of human rights in the Lomé/Cotonou regimes indicated that the suspension practice of the EU on human rights grounds only affected the financial assistance aspects and not the trade regime. A cursory look at the instances in which the EU adopted measures against ACP countries on the ground of gross violations of human rights revealed that trade aspects have always been exempted. For instance, in 1993 the EU announced the imposition of certain restrictive measures on Nigeria as a result of the state of human rights in that country. Those measures did not affect EU-Nigeria trade and, despite repeated calls, the EU Council of Ministers refused to sanction an oil embargo against Nigeria.<sup>273</sup> A similar situation occurred with respect to Haiti. In response to the human rights violations in Haiti, the EC considered the option of imposing a trade embargo, but in the end it did not push it through. It based its decision on two grounds: That a trade embargo would have breached the Lomé Conventions trade provisions and that, in the absence of a UN Security Council resolution under Chapter VII of the UN Charter, a trade embargo would have also contravened obligations of Haiti under GATT.<sup>274</sup> This same thinking may have influenced the EU's decision to suspend financial and technical assistance rather than impose trade restrictions in response to the genocide in Rwanda.<sup>275</sup> Also, in the most recent instance in which the human rights clause was applied against the Republic of Guinea, the EU, in taking appropriate measures in accordance with Article 96 of the Cotonou Agreement, specifically excluded actions against trade cooperation and trade linked preferences.<sup>276</sup>

Once again, thirty years later, the European Union economic interest prevailed on basic principles.

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<sup>272</sup> K.Arts, *Integrating Human Rights...*, p.370.

<sup>273</sup> Karin Arts, *Development Co-operation and Human Rights: Turbulent Times for EU Policy*, in *New Perspectives in the European Union Political Co-operation*, M. Lister ed., 1999

<sup>274</sup> Council Reply to EP question 593/92, rendered 22 October 1992, EPCD Bull., 1992, 490.

<sup>275</sup> E. U. Petersmann, *Human Rights and the Law of the World Trade Organisation*, 37(2) J. WORLD TRADE 241, 259 (2003), especially n. 62.

<sup>276</sup> Council Decision of 14 April 2005, *Concluding Consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement*, OJ L104, 23 April 2005.

### 3.7 CREATING AN EUROPEAN FUNDAMENTAL RIGHTS AGENCY (FRA)

The original proposal for a EU Fundamental Rights Agency (FRA) was met with skepticism in some quarters, in particular from the Council of Europe. Discussions around what the scope and tasks of the FRA were characterized by, on the one hand, the fear that the EU was dabbling in fields in which it had no business and duplicating the work of the Council of Europe and, on the other hand, the sense that the EU was not taking seriously enough its responsibilities with regard to fundamental rights within its borders. The result, launched in March 2007,<sup>277</sup> has been an agency described by Amnesty International as: “based on a fragmented and minimalist conception of ‘fundamental rights’ that bars it from addressing the most pressing human rights challenges in the EU today”.<sup>278</sup>

The FRA was established as the successor to the European Monitoring Centre on Racism and Xenophobia (EUMC), which was also based in Vienna. The EUMC's mandate was narrower than that of the FRA, as it was restricted to issues of racism and xenophobia.<sup>279</sup> The mandate of the FRA has been limited strictly to European Community law.<sup>280</sup> What this means, in concrete terms, is that many of the EU's activities were excluded, in particular those with the greatest potential to impact on human rights and those with the most limited judicial oversight through the European Court of Justice. Thus, for example, the FRA was not able to deal with: counter-terrorism; the EAW<sup>281</sup>; police cooperation, including the exchange of personal data in the context of criminal investigations; exchange of evidence in criminal proceedings under the European Evidence Warrant (EEW), all areas where developments in the EU had potentially serious consequences for the fundamental rights of those concerned. Neither FRA was able to address issues related to the EU's external activities, whether involving police or the military, nor with the external dimension of asylum and immigration questions, such as interception on the high seas

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<sup>277</sup> Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L53/1, 22 February 2007.

<sup>278</sup> Towards a comprehensive European human rights system, the speech that Amnesty International would have made at the inauguration of the EU Fundamental Rights Agency, Amnesty International EU Office, 1 March 2007.

<sup>279</sup> The EUMC grew from the Commission on Racism and Xenophobia (CRX), established in 1994, and also known as the Kahn Commission. The CRX was transformed into the EUMC in June 1998; officially established by Council Regulation (EC) No 1035/97 of 2 June 1997.

<sup>280</sup> The the founding treaties (primary legislation) and the provisions of instruments enacted by the Community institutions by virtue of them (secondary legislation such as regulations, directives etc).

<sup>281</sup> European Arrest Warrant

or cooperation agreements with third countries – issues of increasing concern to human rights groups. The narrow mandate of the FRA has truly been an opportunity lost for the advancement of human rights in the EU. It was no doubt facilitated by the defensive posture of the Council of Europe, articulated by Jean-Claude Juncker, that “the future Agency must be strictly complementary to the Council of Europe’s human rights observation and monitoring instruments. It is essential that its mandate be limited to human rights issues which arise in connection with the implementation of Community law, i.e. strictly within the EU’s internal legal system. It may never be extended to general observation, using its own procedures and resources, of the human rights situation in Council of Europe member states.”<sup>282</sup>

For those who did not want to see “more Europe”, this was clearly a golden opportunity to restrict the possible expansion of EU activity in fundamental rights. The fears expressed in relation to duplication and lack of coherence in the European human rights framework were, however, sadly short-sighted and unimaginative. It became clear that there was no need for the EU to duplicate the work of the numerous Council of Europe human rights bodies in relation to standard-setting and monitoring of the human rights situation in Europe. It became also clear, however, that the EU could take the work of those bodies and build upon it in a way that would have reflected the particular nature of the EU, as opposed to the Council of Europe, and that the FRA could have been the ideal body to translate the work of the Council of Europe into advice and proposals that would have been relevant for EU institutions and member states alike. The FRA could have been used, for example, to analyze the reports of the European Committee for the Prevention of Torture and the European Commissioner for Human Rights, along with European Court of Human Rights case-law in relation to EU member states, in order to identify issues which might undermine the smooth functioning of judicial cooperation in criminal matters. If prisons in some EU member states were found by the Council of Europe bodies to systematically fall below internationally accepted standards, this would have made it difficult for other member states to return people to those countries in compliance with their own human rights obligations, both nationally and under the ECHR, thus threatening the effectiveness of the EAW system.<sup>283</sup> The FRA would then have been able to provide advice to EU institutions and to member states as to how to address the problem within the EU

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<sup>282</sup> Report by Jean-Claude Juncker, Council of Europe — European Union: ‘A sole ambition for the European continent’ (11 April 2006)

<sup>283</sup> Great Britain: Parliament: House of Lords: European Union Committee, Human Rights Protection in Europe: The Fundamental Rights Agency; Report with Evidence, 29<sup>th</sup> Report of Session, 2005-06.

framework, either through technical assistance and advice or through additional legislation or policy development which would have ensured the coherence of the EU's approach to judicial cooperation. In addition, the FRA could provide an invaluable resource to the EU in its increasingly active involvement in both military aspects of crisis management, and engagement with third countries in the fields of police cooperation and agreements on managing asylum and immigration.<sup>284</sup>

These developments continued to be at the heart of human rights concerns about the EU and the lack of accountability for actions taken by the EU outside the Community framework. In this framework the Agency should have become an important way of casting light on these difficult issues. However, over the years, even if there were the best intentions to make it successful (at least "on paper"), in practice the results haven't been always the expected ones.

### 3.8 THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS UNDER THE TREATY OF LISBON

The attention focused on the people of Europe and the human dimension in the development of the European Union, which had already found expression in the provisions of the Treaty of Amsterdam and in the creation of the area of freedom, security and justice, was also reflected in the formulation of the Charter of Fundamental Rights of the European Union. At the request of the European Parliament, the European Council, meeting in Cologne from 2 to 4 June 1999, decided to have the rights of European citizens codified, since 'protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy'.<sup>285</sup>

It is true that, in the field of human rights, the Member States of the European Communities are signatories to the Council of Europe's Convention of 4 November 1950 on the Protection of Human Rights and Fundamental Freedoms and to the Final Act of the Conference on Security and Cooperation in Europe, concluded on 1 August 1975. Although the founding treaties of the Communities did not refer explicitly to international agreements, the case law of the European Court of Justice has

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<sup>284</sup> <http://fra.europa.eu/it>

<sup>285</sup> Cologne European Council, 3-4 June 1999, Conclusion of the Presidency. See [http://www.europarl.europa.eu/summits/kol2\\_en.htm](http://www.europarl.europa.eu/summits/kol2_en.htm)

established that human rights had to be a paramount reference point for the exercise of Community powers. Parliament and the Council have frequently reaffirmed their commitment to human rights and fundamental freedoms. Since the signing of the Single European Act on 17 and 28 February 1986, the aim of safeguarding these rights and freedoms has been expressly enshrined in the Community treaties. Nevertheless, there seemed to be a need to draw up an instrument encompassing all the rights of European citizens, in other words not only the fundamental rights derived from the common constitutional traditions of the Member States but also the civil, political, economic and social rights enjoyed by citizens of the European Union. Such a charter had to be incorporated into the Treaties so that any European citizen could refer to them and, if needed, assert them in a court of law. The drafting of such a charter was to be completed before the European Council summit in Nice, scheduled for December 2000. At its meeting in Tampere on 15 October 1999<sup>286</sup>, the European Council specified the composition of the 62-member body, which gave itself the more prestigious title of "Convention". The Convention held its constituent meeting on 17 December 1999 and elected as its chairman Roman Herzog, former President of the Federal Republic of Germany. Its deliberations were conducted with maximum transparency, with the transcript of public debates and the text of preparatory documents being made available on the Internet. There were inputs from representatives of the European Court of Justice, the Council of Europe, trade unions, non-governmental organizations and the governments of countries applying for accession to the EU. However, in order to establish a consensus and to make the text of the draft acceptable to all the Member States, the result comprehended clauses with a compromise nature and with careful wording.

Many were the difficulties that had to be overcome. There was a basic need to take account of the differences between national legal systems, such as the contrast between the Latin countries' attachment to statute law and that of the British to common law. Then there was the difference in interpretation between the Germans, for whom the law is enforceable, in the sense that an individual has a right of recourse to the courts to have the law applied, and the French, who distinguish between the general principle of the 'droit à' (the 'right to'), which creates no precise obligation, and the 'droit de' (the 'right of'), which is effectively enforceable. The aim of the drafting

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<sup>286</sup> Cameron Ross, *Perspectives on the Enlargement of the European Union*, Leiden-Boston-Koln Brill 2002, p.254.



process was to produce a clearly worded document that was publicly accessible yet precise enough to be a source of law if the Charter was incorporated into the Treaties of the European Union.

In spite of the aforementioned difficulties, the Convention made rapid progress. The draft was completed on 26 September 2000 and was presented to the European Council at its Biarritz Summit on 12 and 13 October with a view to final adoption or rejection at the Nice Summit.

The preamble to the Charter placed the individual at the heart of its activities by establishing the citizenship of the Union and by creating an “area of freedom, security and justice”. The preamble specifies that the Union contributes to the preservation and development of these common values “while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States”[...] “with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity”. On the whole, in spite of the inadequacies and excessive caution resulting from divergent outlooks and policies, the Charter resulted as a coherent entity. Its legal status, however, could not be defined a “success”. If it was a constitutional instrument binding the Member States, it would have been the subject of a ratifiable treaty. On receiving the draft in Biarritz<sup>287</sup>, the European Council did not wish to go so far and decided that the Charter would have simply been subject to approval by the Council.

In Nice, before the opening of what proved to be a particularly difficult meeting of the European Council, the Heads of State or Government were content to opt for a solemn proclamation, jointly with Parliament and the Commission, of the Charter of Fundamental Rights of the European Union, thereby shelving any discussion about the legal status of the text. It fell to the Convention on the Future of Europe to integrate it without amendment into the draft Constitutional Treaty which it adopted on 13 June 2003 and submitted officially, in Rome on 18 July 2003, to Silvio Berlusconi, President-in-Office of the Council of the European Union, whose task it was to open the Intergovernmental Conference (IGC). The Treaty establishing a Constitution for Europe was solemnly signed in Rome by the representatives of the 25 Member States on 29 October 2004.

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<sup>287</sup> Informal Biarritz European Council (IGC) of 13 and 14 October 2000 on the Charter of Fundamental Rights of the European Union.

To become a legally binding instrument the Charter will have to wait some years, in fact only in 2009 with the Treaty of Lisbon, it finally obtained the legal status it deserved. The European Council's political assent on the "Reform Treaty" signed in Lisbon on 19 October 2007 is a milestone in the evolution of the European legal order. It puts an end to the period under the "sign" of the Treaty establishing a Constitution for Europe<sup>288</sup> and renounces writing the text in the form proposed by the former project, the method of intergovernmental conferences being preferred. The result has been a text based on the structure of the Treaties of Rome<sup>289</sup> and Maastricht, which has over 250 pages and brings nearly 300 changes.

The main points of reform of the Lisbon Treaty have referred to institutional changes, changes in the voting system, the introduction of some new Community policies, the reversibility of the integration process, the possibility of withdrawal of the Member States from the EU, respectively. Last but not least the Treaty established fundamental provisions on human rights protection.

The latter provisions may be viewed in light of criticism that has been raised against the EU for an inconsistent and incoherent approach to fundamental rights protection.<sup>290</sup> In particular, since the beginning criticism has been voiced over how the EU's strong insistence on fundamental rights protection in its external relations did not appear to be matched by an equally strong "internal" focus on such fundamental rights protection.<sup>291</sup> Some commentators also took the view that the EU at its then current state (at the turn of the millennium) was inappropriate as a human rights organization in its own right.<sup>292</sup> In this light, it is clear that with the new Article 6 TEU the protection of fundamental rights in the EU context has been taken to a new level. While the EU perhaps cannot be said to have become a proper "human rights organization", clearly steps have been taken in the Lisbon Treaty to highlight the EU's commitment to fundamental rights

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<sup>288</sup> The project of the Constitutional Treaty was ratified by 18 Member States (Germany, Austria, Bulgaria, Greece, Hungary, Italy, Lithuania, Romania, Slovakia, Slovenia, Spain, Belgium, Cyprus, Estonia, Finland, Latvia, Luxembourg, Malta) but it was rejected by referendum in 2005 by France and the Netherlands.

<sup>289</sup> The Treaty of Rome establishing the European Community, which as explained in chapter 1 was amended by the 1996 Merger Treaty by the Single European Act of 1986, by the Treaty of Amsterdam in 1997 and the Treaty of Nice in 2001.

<sup>290</sup> Turner, "Human Rights Protection in the European Community: Resolving Conflict and Overlap Between the European Court of Justice and the European Court of Human Rights", *European Public Law*, 5(3)(1999).

<sup>291</sup> De Búrca, "Convergence and Divergence in European Public Law: the case of human rights", in P. Beaumont, C. Lyons, & N. Walker, *Convergence and Divergence in European Public Law* (2002), p. 135 with further references and p. 142 et seq.

<sup>292</sup> Von Bogdandy, "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", *Common Market Law Review*, 37 (2000), p. 1317.

protection. An immediate example would be the obligation for the EU to accede to the European Convention for the Protection of Human Rights and Fundamental. Moreover, Article 6 TEU brought about changes also for the Member States. By turning the Charter of Fundamental Rights into a legally binding instrument, Article 6 TEU obliged also the Member States to respect the provisions of the Charter.<sup>293</sup>

Under the same article, the Charter of Fundamental Rights were finally be recognized equal legal value to that of the treaties (although its text is not included in the Treaty of Lisbon as it was in the draft of the Constitutional Treaty). The Charter became part of what is called "original" Community law. The rights protected by the Charter were included in chapters called "dignity", "freedom", "equality", "solidarity", "citizenship" and "justice". As can easily be noticed, many rights corresponded to those stated by the European Convention on Human Rights. To ensure the necessary consistency between the Charter and the Convention, the meaning and the scope of these rights, including the allowed restrictions, were made identical to those under the Convention.<sup>294</sup> It follows that, in establishing the restrictions on these rights, the legislator had to respect the same rules concerning the restrictions imposed by the Convention, without prejudice to the autonomy of the Union law and the Court of Justice of the European Union. A difference is that the limitations of some rights has not been stated like in the Convention for each of the rights they operate on, but they have been included in a general provision which refers to the ECHR case law and also to the Community institutions and to the Member States of the Union as main recipients of these rights<sup>295</sup>.

The Charter also recommended that national judges and the European jurisdictions should have considered, as an instrument of interpretation (though not legally binding) the "Explanations relating to the Charter of Fundamental Rights"<sup>296</sup>. They sent in some

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<sup>293</sup> See Article 51(1) of the Charter.

<sup>294</sup> Francesca Ferraro and Jesús Carmona, *Fundamental Rights in the European Union: The Role of the Charter after the Treaty of Lisbon*, EPRS | European Parliamentary Research Service, March 2015.

<sup>295</sup> Ibid.

<sup>296</sup> On the role of the 'Explanations' in the interpretation of the Charter, see e.g. Jean-Paul Jacqué, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights*, Hart Publishing, 2014, p. 1715ff.

cases to the ECHR case law in order to define the meaning of the articles in the Charter.<sup>297</sup>

In terms of social rights, the Charter is less developed than the European Social Charter. It distinguishes between subjective rights (prohibition of child labor) and principles that apply only to the national legislative power (right to adequate living conditions, right of access to placement services<sup>298</sup>).

The entry into force of the Treaty represented also a step toward the EU's accession to the European Convention on Human Rights, procedure that would have soon influenced the relation between the European Union and the Council of Europe. Unlike the project of the Constitutional Treaty that required for accession the vote of qualified majority and did not require ratification, the Annex-Protocol to the Lisbon Treaty stated that the accession would have retained the characteristics of the Union and the features of its law and would have not affected the competences and duties of the institutions, guaranteeing the status quo of the Member States towards the European Convention (in terms of derogations, accepted reservations, etc.).<sup>299</sup>

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<sup>297</sup> For example, in explaining Title II ("freedoms") art. 19 which guarantees protection in the event of removal, expulsion or extradition, the ECHR decision in the Ahmed v. Austria case and the famous Soering case are invoked, and in explaining Title VI concerning the right to a fair trial, the ECHR position in the Airey case is retained, position according to which protection should also be granted in the case when the absence of the person would make it inefficient to guarantee the effective access to justice.

<sup>298</sup> Catherine Haguenau-Moizard, *Gazette Européenne* nr. 39, 128e année, nr.170, 171, p. 32.

<sup>299</sup> D.Ashiagbor, N.Countouris, I.Lianos, *The European Union After the Treaty of Lisbon*, Cambridge University Press, 2002.



## CONCLUSION

For a long time and similar to most other Western political systems, the EU ignored the promotion of democracy, human rights, and the rule of law. Its development policy mainly focused on economic cooperation, and the Member States made hardly any effort to bring their policies in line with the EU. Consequently, the role of the EU was more based in being an additional donor rather than a coordinator of European development policies.

By 1990 everything seemed to change. The EU started creating a comprehensive strategy for the promotion of democracy, human rights, the rule of law, and good governance covering the entire globe. However, the human rights policies of the European Union resulted mostly beset by a paradox. Indeed, if on the one hand, the Union has been a staunch defender of human rights in both its internal and external affairs, on the other hand, it lacked a comprehensive or coherent policy at both level, and fundamental doubts persisted as to whether the institutions of the Union possessed adequate legal competence in relation to a wide range of human rights issues arising within the framework of Community policies.

On the positive side of the balance sheet, the EC/EU showed during the years between 1950 and 2000 a strong commitment to human rights. The Amsterdam Treaty proclaimed “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law”. By the same token, any Member State violating human rights in a “serious and persistent” way could lose its rights under the Treaty. The European Court of Justice has long required the Community to respect fundamental rights and the European Council has issued several major statements emphasizing the importance of respect for human rights. Similarly, the Community has taken notable initiatives in a wide range of fields. This is so despite the fact that the Member States were, and remained, the principal guardians of human rights within their own territories.

Particularly from the 1990s the Union revealed itself as a powerful and uniquely representative actor on the international scene. It had the responsibility, reinforced by the capacity and financial resources, to influence significantly the human rights policies of other states as well as those of international organizations. Nevertheless, despite the frequency of statements

underlining the importance of human rights and the existence of a variety of significant individual policy initiatives, the European Union has always lacked a fully-fledged human rights policy. This is true both in relation to its internal policies and, albeit to a lesser extent, its external policies. In relation to its internal human rights situation, the institutions of the Community have succeeded in cobbling together a makeshift policy, which has been barely adequate, but by no means sufficient. In relation to its external policies, the Union has, by virtue of its emphasis upon human rights in its relations with other states and its ringing endorsements of the universality and indivisibility of human rights, highlighted the incongruity and indefensibility of combining an active external policy stance with what in some areas came close to an abdication of internal responsibility. At the end of the day, the Union could only achieve the leadership role to which it aspired through the example it had set to its partners and other states.

Also the institutional arrangements made by the Community in order to give effect to human rights policies have generally been inadequate, both in relation to internal and external matters. In the great majority of instances, the task has been left to entities with a very vague human rights mandate, reinforced by little expertise and even less interest. In a few isolated instances, however, and especially in relation to external policies, the Commission has established units with a specific mandate (They include Unit 2 of Directorate A of Directorate-General 1A, responsible for human rights and democratization, and Unit 4 of Directorate-General VIII responsible for the coordination of issues relating to the rule of law, fundamental freedoms, democratization and institutional support). Although they faced many obstacles, these isolated units achieved enormous results through the promotion of human rights activities in a wide range of areas. The Commission's budget lines are one indicator of their particular significance in terms of human rights and democracy. Indeed, the "European initiative for democracy and human rights" (Chapter B7-70 of the Community budget) began in 1994 with a budget of 59.1 million euros, and already in 1998 some 97.4 million euros were available for grants. Of course the role, impact and effectiveness of the Commission's activities would have been considerably enhanced if measures were taken to better deal with the obstacles that impeded the work of the Commission in the human rights area.

In 2001, von Bogdandy, professor of public law and director at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, provocatively raised the question whether the EU was or could be what he referred to as a "human rights organization". Since

then, countless arguments in favor of the EU developing into a global or post national human rights organization, regime or framework have been brought forward.

Based on historical facts and taking into consideration a huge amount of sources provided by the Historical Archives of the European Union, this dissertation has hopefully helped clarify the contours of what have been the major fights of the European Union along the path through the creation of a human rights organization. On those grounds, it also aimed to emphasize the unique capacity of the EU in that respect, and the scope of the human rights duties it acquired.





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